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NOV 8 '60

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35045

ORPHA ANDERSON,

Appellee,

v.

INTER-STATE BUSINESS MEN'S
ACCIDENT ASSOCIATION OF
DES MOINES, IOWA, a corporation,

Appellant.

8/60
2/3
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

267 I.A. 597

Opinion filed June 15, 1932

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment rendered in the Superior Court of Cook County in favor of the plaintiff. The plaintiff, a beneficiary in an action on an accident insurance policy sought to recover for the alleged accidental death, by drowning on the night of June 10, or on the morning of June 11, 1919, of the insured, Ralph Anderson, husband of the plaintiff.

The declaration, filed on September 9, 1921, alleged the issuance of the policy sued on to Ralph Anderson, and its delivery to him at Traverse City, Michigan. The terms and provisions of the policy fully appear in the declaration, in which policy the plaintiff is named as beneficiary. To this declaration the defendant demurred, which demurrer was overruled, and thereupon the defendant filed the plea of the general issue. On November 10, 1928 an additional count was filed by the plaintiff, in which it is alleged that there was a waiver by the defendant of the requirement of a proof of loss by the plaintiff. To this count the defendant filed special pleas of limitation under the terms of the policy. The plaintiff demurred, which demurrer was overruled, and thereupon the plaintiff replied to these pleas, to which the defendant demurred and was sustained.

It is contended by the defendant that the declaration does not state a cause of action; that while it alleges death on

NOV 8 '09

35048

ORIN ANDERSON,

appellee,

v.

INTER-STATE BUSINESS MEN'S
ACCIDENT ASSOCIATION OF
DES Moines, IOWA, a corporation,

Appellant.

COOK COUNTY,

SUPERIOR COURT,

APPEAL FROM

267 I.A. 597

Opinion filed June 18, 1932

MR. PRESIDING JUSTICE HERBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment

rendered in the Superior Court of Cook County in favor of the

plaintiff. The plaintiff, a beneficiary in an action on an accident
insurance policy sought to recover for the alleged accidental death,

by drowning on the night of June 10, or on the morning of June 11,

1932, of the insured, Ralph Anderson, husband of the plaintiff.

The declaration, filed on September 9, 1931, alleged

the issuance of the policy sued on to Ralph Anderson, and its

delivery to him at Traverse City, Michigan. The terms and provisions

of the policy fully appear in the declaration, in which policy the

plaintiff is named as beneficiary. To this declaration the defendant

demurred, which demurrer was overruled, and thereupon the defendant

filed the plea of the general issue. On November 10, 1932 an

additional count was filed by the plaintiff, in which it is alleged

that there was a waiver by the defendant of the requirement of a

proof of loss by the plaintiff. To this count the defendant filed

special pleas of limitation under the terms of the policy. The

plaintiff demurred, which demurrer was overruled, and thereupon the

plaintiff replied to these pleas, to which the defendant demurred

and was sustained.

It is contended by the defendant that the declaration

June 11, 1919, resulting from an accident, there is no allegation or inference to be drawn from the words used that the accident occurred within 90 days of the time of his alleged death. The allegation in the declaration is to the effect that the insured's death in Lake Michigan on June 10, or June 11, 1919, resulted from accidental drowning, and it is reasonable to infer from that allegation that he came to his death on that day, and that the accident occurred within 90 days of the time of his alleged death. The fact that the defendant pleaded over after its demurrer was overruled, waives the right to question the verdict rendered by the jury in a good cause of action defectively stated, Chicago & Alton Railroad Co. v. Clausen, 173 Ill. 100, and after a careful consideration of the question, we are of the opinion that the allegations in the declaration are sufficient to sustain the verdict rendered by the jury.

It is contended by the defendant that the plaintiff did not furnish affirmative proof of loss as required by the terms of the policy that the policy requires that "affirmative proof of loss must be furnished to the Association * * * within 90 days after the date of * * * the loss."

From the record it appears that the plaintiff offered in evidence the insurance policy, the notice, and what is purported to be a proof of loss. The proof of loss is as follows:

"To The Interstate Business Men's Accident Association:

You are hereby notified that Ralph A. Anderson took passage on the Steamship 'Alabama' at Chicago, Illinois, on the evening of June 10th, 1919, for Muskegon, Michigan, and that he is believed to have been lost overboard while in passage from Chicago to Muskegon on the night of June 10th or the morning of June 11th, 1919, and that he is dead and that his death was caused by violence or accident.

He held a policy in your Company No. 145834 and the undersigned is beneficiary in case of death.

Dated, August 8, 1919.

TRAVERSE CITY, MICHIGAN,

(Mrs.) Orpha E. Anderson."

June 11, 1919, resulting from an accident, there is no allegation of inference to be drawn from the words used that the accident occurred within 90 days of the time of his alleged death. The allegation in the declaration is to the effect that the insured's death in Lake Michigan on June 10, or June 11, 1919, resulted from accidental drowning, and it is reasonable to infer from that allegation that he came to his death on that day, and that the accident occurred within 90 days of the time of his alleged death. The fact that the defendant pleaded over after its demurrer was overruled, waives the right to question the verdict rendered by the jury in a good cause of action defectively stated. Chicago & Alton Railroad Co. v. Glasgow, 173 Ill. 100, and after a careful consideration of the question, we are of the opinion that the allegations in the declaration are sufficient to sustain the verdict rendered by the jury. It is contended by the defendant that the plaintiff did not furnish affirmative proof of loss as required by the terms of the policy that the policy requires that "affirmative proof of loss must be furnished to the Association" - "within 90 days after the date of the loss."

From the record it appears that the plaintiff offered in evidence the insurance policy, the notice, and what is purported to be a proof of loss. The proof of loss is as follows:

"To The Interstate Business Men's Accident Association:
 You are hereby notified that Ralph A. Anderson took passage on the Steamship 'Albatross' at Chicago, Illinois, on the evening of June 10th, 1919, for Waukegan, Wisconsin, and that he is believed to have been lost overboard while in passage from Chicago to Waukegan on the night of June 10th or the morning of June 11th, 1919, and that he is dead and that his death was caused by violence or accident.
 He held a policy in your Company No. 148232 and the undersigned is beneficiary in case of death.
 Dated, August 6, 1919.
 TRAVELERS CITY, MISSOURI.
 (Mrs.) Ophelia E. Anderson."

A letter, dated August 18, 1919, from the defendant to the plaintiff showing that the defendant received plaintiff's so-called proof of loss on or prior to August 18, 1919, is as follows:

"Health and Accident Insurance
Inter-State Business Men's Accident Association
of Des Moines, Iowa.

August 18, 1919.

Mrs. Orpha E. Anderson,
Traverse City, Mich.
Dear Madam:

In compliance with your request of the 8th inst. we are enclosing herewith a set of claim blanks with the understanding that in furnishing them the Association does not admit of any liability in connection with any claim which may be filed, neither is the act of furnishing the blanks to be construed as a waiver upon the part of the Association.

It does not appear from the facts presented in your notice that there is any liability upon the part of the Association on account of the disappearance of Mr. Anderson.

Assuring you that we very much regret to learn of the unfortunate disappearance of Mr. Anderson, I am,

Yours truly,
E. L. Beck,
Mgr. Claim Dept."

It is to be noted from the defendant's letter to the plaintiff that the plaintiff is advised that from the facts in the notice of the plaintiff it does not appear that there is any liability upon the part of the Association on account of the disappearance of Mr. Anderson. It appears from this letter that the defendant treated the plaintiff's notice as proof of loss sufficient to enable it to pass upon its liability in this case, and it ought not afterwards to be heard to say that it was insufficient, and it necessarily follows that it is estopped from making any objection that this proof of loss was not a proper one. The defendant's position is that the defendant's letter did not induce the plaintiff to believe that her proofs, if she had submitted them, would not receive proper consideration by the defendant. The answer to this contention is that the defendant acted upon the facts as set forth in plaintiff's notice

A letter, dated August 18, 1918, from the defendant to the plaintiff showing that the defendant received plaintiff's so-called proof of loss on or prior to August 18, 1918, is as follows:

"Health and Accident Insurance
Inter-State Business Men's Accident Association
of Des Moines, Iowa.
August 18, 1918.

Mrs. Ophelia A. Anderson,
Traverse City, Mich.
Dear Madam:

In compliance with your request of the 5th inst. we are enclosing herewith a set of claim blanks with the understanding that in furnishing them the Association does not admit of any liability in connection with any claim which may be filed, neither is the act of furnishing the blanks to be construed as a waiver upon the part of the Association.

It does not appear from the facts presented in your notice that there is any liability upon the part of the Association on account of the disappearance of Mr. Anderson.

Assuming you that we very much regret to learn of the unfortunate disappearance of Mr. Anderson, I am,

Yours truly,
E. L. Cook,
Mgr. Claim Dept."

It is to be noted from the defendant's letter to the plaintiff that the plaintiff is advised that from the facts in the notice of the plaintiff it does not appear that there is any liability upon the part of the Association on account of the disappearance of Mr. Anderson. It appears from this letter that the defendant treated the plaintiff's notice as proof of loss sufficient to enable it to pass upon its liability in this case, and it ought not afterwards to be hard to say that it was negligent, and it necessarily follows that it is estopped from making any objection that this proof of loss was not a proper one. The defendant's position is that the defendant's letter did not induce the plaintiff to believe that her proofs, if she had submitted them, would not receive proper consideration by the defendant. The answer to this contention is that the

and proof of loss, and denied liability, which was not necessary if it needed further proof. No objection is made to the form of the proof, or that it was not sworn to, but only upon the ground that there was no liability. If the defendant wished to insist upon strict compliance with the terms of the policy in that regard, the objection should have been made upon specific grounds, so that the plaintiff could have obviated the objection.

The next question to be considered is, was the evidence as a matter of law sufficient to justify its submission to the jury? There is evidence in the record that the defendant, Inter-State Business Men's Accident Association of Des Moines, Iowa, a Corporation, on July 15, 1918, issued and delivered to Ralph Anderson, of Traverse City, Michigan, a health and accident policy, in which policy the plaintiff is named as beneficiary. The insured was in the undertaking business, and also conducted a floral business. He resided in Traverse City, Michigan. On Sunday evening, June 8, 1919, he left Traverse City by train, and arrived in Chicago on the morning of Monday, June 9, 1919, but before leaving Traverse City for Chicago, he invited his wife and a married couple to make the trip with him, but the married couple could not go, and so he went alone. While in Chicago on Monday and Tuesday, Anderson saw several business acquaintances, and was entertained by one of his business friends on Tuesday June 9, 1919, at dinner, and later attended a theatre performance. While in Chicago he wrote a letter to his wife telling her when he would return to Traverse City, on the boat. On June 10 about 7:40 p.m. the steamship "Alabama" left its dock at Chicago, and from the evidence it appears that Anderson was seen by Capt. M. D. Mackey in the dining room of the boat shortly after the "Alabama" left the dock, and was never seen after that time. Capt. Mackey was the master of the Steamship Arizona, which, together with the Alabama was owned by the Goodrich Steamship

Company. At the time in question, Capt. Mackey was a passenger on the Alabama going from Chicago to Muskegon on business for the company. At 6 o'clock in the evening of June 11, 1918, Capt. Mackey, being at the Goodrich Company offices at the dock in Muskegon, Michigan, learned of clothing having been found in one of the rooms that had been assigned to Ralph Anderson, but which had not been occupied, and communicated these facts to the Anderson family by telephone from Muskegon to Traverse City. His testimony was taken by deposition in 1929.

It also appears in evidence that Mrs. Anderson, the plaintiff, employed detectives, but that they were unable to find any other persons among the passengers or crew who had seen Anderson on the Alabama on the night of June 10; that he was not seen to leave the boat when it docked at Grand Haven or Muskegon by police officers stationed at these docks; nor could the officers remember having seen a person of his description. Accounts of Anderson's disappearance appeared in the local papers at the time, and hand bills were distributed in which a picture and a description of Anderson were printed, but he was not seen nor heard from after his disappearance.

It also appears in the record that when the grip Anderson took with him was examined by the plaintiff, she identified the contents as belonging to Anderson; that a large diamond ring which he wore was missing from his effects, and there is evidence to show that he was in the habit of carrying a large roll of bills in his pocket. It also appears from the evidence that he purchased the undertaking establishment that he was conducting from his relatives, and apparently was not being pressed by any of his creditors; that he paid to his father and maiden aunts certain sums

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Company. At the time in question, Capt. Mackay was a passenger on the Alaskan going from Chicago to Vancouver on business for the company. At 8 o'clock in the evening of June 11, 1934, Capt. Mackay, being at the location company office at the dock in Vancouver, Michigan, learned of a shooting having been found in one of the rooms that had been assigned to Ralph Johnson, 227 West 10th Street, and Mackay immediately went to the room to see what was going on. His telephone was taken by a woman in 1934.

It also appears in evidence that Mr. Johnson, the plaintiff, employed a detective, but that they were unable to find any other persons about the neighborhood at that time who had been in the room on the night of June 11; that he was not seen to leave the room when it looked at around seven or Jackson by police officers stationed at that time; that under the witness statement having been a person of his description. Johnson of Jackson's disappearance appeared in the local papers at the time, and had calls were directed in that a person was a description of interest was stated, but he was not seen nor heard from after his disappearance.

It also appears in the record that when the wife Johnson took with him was examined by the plaintiff, she identified the contents as belonging to Johnson; that a large diamond ring which he was wearing from his father, and that he was in the habit of carrying a large roll of bills in his pocket. It also appears from the evidence that he was the underlying witness that he was conducting from his activities, and ultimately was not seen or heard from after his

for the purchase of this undertaking establishment, which purchase price was secured by a \$8,000 mortgage; that he was indebted to a local bank in the sum of \$4500; that he had a bank balance, evidenced by the records of the bank, of \$1,364.65; that at the time of his disappearance he was enlarging his business, notwithstanding competition from other undertaking establishments, and was erecting a new garage building valued at \$7,000, in which to store his funeral cars and taxicabs, and to do a garage business. From the evidence it appears that his assets were of the value of \$33,000, and that he was indebted in the sum of \$13,000. Of this sum \$8,000 was an indebtedness represented by a mortgage to secure the payment of the monthly sum to his father and aunts.

While there is evidence in the record that Ralph Anderson had relations with several women, particularly with one Esther Martin, still this did not seem to affect his standing in the community or with his family. His wife, after a brief period of estrangement because of these escapades, forgave him, and the evidence shows that he displayed affection for his wife and two children, and appeared to be friendly with his father and aunts.

The question of the insured's death upon the facts in this case is one properly for a jury to determine. At the time of the trial in May 1930, the insured had been absent eleven years, and during that time between June 11, 1919 and May 1930, Ralph Anderson has never been heard from, nor seen by anyone. From the facts it may be inferred that the insured came to his death by drowning on the night of June 10, or the morning of June 11, 1919. We believe that the evidence was properly submitted to the jury, that the jury was fully justified in rendering its verdict in favor of the plaintiff, and that but one inference is to be drawn from all the facts and circumstances in evidence: That Ralph Anderson

for the purchase of this undertaking establishment, which purchase price was secured by a \$25,000 mortgage; that he was indebted to a local bank in the sum of \$25,000; that he had a bank balance, evidenced by the records of the bank, of \$1,364.88; that at the time of his disappearance he was enlarging his business, notwithstanding his indebtedness from other undertaking establishments, and was erecting a new garage building valued at \$75,000, in which to store his personal cars and trailers, and to do a garage business. From the evidence it appears that his assets were of the value of \$25,000, and that he was indebted in the sum of \$25,000. Of this sum \$25,000 was an indebtedness represented by a mortgage to secure the payment of the monthly sum to his father and mother.

While there is evidence in the record that Ralph Johnson had relations with several women, particularly with one Esther Austin, still this did not seem to affect his standing in the community or with his family. His wife, after a brief period of estrangement because of these associations, forgave him, and the evidence shows that he displayed affection for his wife and her children, and seemed to be friendly with his father and mother. The emotion of the insured's death upon the issue in this case is one properly for a jury to determine. At the time of the trial in May 1930, the insured had been absent eleven years, and during that time between June 11, 1919 and May 1929, while Johnson has never been heard from, nor seen by anyone, from the facts it may be inferred that the insured came to his death by drowning on the night of June 10, or the morning of June 11, 1919. It appears that the evidence was strongly weighted in the jury's favor that the jury was justified in concluding the insured to have

lost his life by accidental drowning.

The defendant suggests that the plaintiff's instructions 3, 5 and 6 are erroneous in that the instructions do not confine the jury to the evidence introduced, and leave the question of law to be determined by the jury; that in instruction No. 3 the jury are told that notice must be given within a reasonable time and the proof of loss must be given within a reasonable time in view "of all the facts and circumstances of the case."

In instruction No. 5 the jury are instructed that the "notice must be given within a reasonable time in view of all the facts and circumstances connected with the case," and in instruction No. 6 the jury are told that the proofs of death must be such as "are reasonable under the facts and circumstances of the case."

We have examined all of the instructions and find from the instructions given that the jury was properly instructed that in order to find the issues for the plaintiff they must do so from a preponderance of the evidence in the case.

It is also to be noted from the questioned instructions that the court performed its function by defining for the jury the meaning of the terms of the policy with respect to notice and proof of death, and that in other instructions the question is left to the jury to determine from the evidence whether the beneficiary "rendered as full proof of loss of death as circumstances would permit."

The defendant contends that the refused instructions 16, 17, 18 and 19 are in accord with the terms of the policy and the law, and that the court erred in refusing to give these instructions. Defendant's instruction 17 told the jury that plaintiff's Exhibit 2 was not a proof of loss, and the court refused to give this instruction, which was proper for the reason that we express in this opinion upon the proof of loss submitted to the

Test his life by accidental drowning.

The defendant suggests that the plaintiff's instructions

No. 2 and 3 are erroneous in that the instructions do not confine the jury to the evidence introduced, and leave the question of law to be determined by the jury; that in instruction No. 2 the jury are told that notice must be given within a reasonable time and the question of law must be given within a reasonable time in view of all the facts and circumstances of the case.

In instruction No. 3 the jury are instructed that the "notice must be given within a reasonable time in view of all the facts and circumstances connected with the case," and in instruction

No. 6 the jury are told that the proofs of death must be such as "are reasonable under the facts and circumstances of the case." He have examined all of the instructions and find them

The defendant gives that the jury are properly instructed that in order to find the issues for the plaintiff they must be given a preponderance of the evidence in the case.

It is also to be noted that the questioned instructions

that the court instructed the jury by stating that the jury are to determine of the facts of the case with respect to notice and amount of death, and that in other instructions the question is left to the jury to determine from the evidence whether the beneficiary "rendered as full proof of loss of death as circumstances would permit."

The defendant contends that the relevant instructions No. 12, 13 and 14 are in accord with the terms of the policy and the law, and that the court erred in refusing to give these instructions. Defendant's instruction 12 told the jury that plaintiff's Exhibit 1 was not a proof of loss, and the court refused to

defendant. Instruction 19 was properly refused for the reason that it told the jury that affirmative proof of loss meant a sworn statement signed by the plaintiff, and for the other reasons heretofore stated. Instruction 18 was properly refused for the reason that the facts were erroneously stated, and instruction 18 was properly refused because the instruction was only a partial statement of the legal effect of the policy in controversy.

Our attention is called by the defendant to the fact that the trial court made prejudicial remarks in the presence of the jury and examined a witness in a manner prejudicial to the defendant. The Court should hesitate to examine witnesses appearing either for the plaintiff or the defendant, and should do so only for the purpose of aiding the court or the jury in ascertaining the facts in controversy. Extensive examination of witnesses by the court should be avoided, because such procedure may have an influence upon the jury detrimental to one of the parties. The court should exercise care to avoid giving expression to any thought that may lead a jury to believe that the court is favorable or unfavorable to either of the parties litigant, or their witnesses, and unless the trial court has manifestly disregarded his duty in that respect this court would not be warranted in holding that his conduct constituted reversible error.

We have carefully examined the record in this regard and find that the first contention is that during the examination of the plaintiff as a witness, the trial court referred to her as the widow, and upon objection, promptly stated to the jury that the court unconsciously used the word widow and meant nothing; that the court was expressing no opinion that this man is dead, or that this woman is his widow. These are questions of fact for the jury to decide, and we believe that the trial court in so doing properly

... testimony. Furthermore it was properly returned for the jury to find that it was the duty of the jury to find that the statements signed by the defendant, and for the other reasons here- tofore stated. Furthermore it was properly returned for the jury to find that the facts were erroneously stated, and investigation is not properly returned because the investigation was only a partial state- ment of the legal effect of the policy in controversy.

But attention is called by the defendant to the fact that the trial court made prejudicial remarks in the presence of the jury and examined a witness in a manner prejudicial to the defendant. The court should hesitate to examine witnesses appearing either for the plaintiff or the defendant, and should do so only for the purpose of aiding the jury in ascertaining the facts in controversy. Extensive examination of witnesses by the court should be avoided, because such procedure may result in injustice upon the jury prejudicial to one of the parties. The court should exercise care to avoid giving expression to any thought that may lead a jury to believe that the court is favorable or unfavorable to either of the parties litigant, or their witnesses, and unless the trial court had manifestly disregarded his duty in that respect this court would not be warranted in holding that his conduct constituted reversible error.

It was manifestly assumed the record in this matter and that the first contention is that during the examination of the plaintiff as a witness, the trial court refused to let her sit down, and upon objection, promptly stated to the jury that the court unnecessarily used the word "also" and meant nothing that the court was expressing no opinion that this man is dead, or that

advised the jury that it had no opinion, and that the remarks of the court under the circumstances did not have a prejudicial effect upon the jury.

Another complaint is with reference to the court's question during the examination of the witness Andrew B. Milne, "What night was it this boat left with Mr. Anderson?" Upon objection by the defendant the court struck out the words, "with Mr. Anderson," and changed the court's question to, "What night was it that it is claimed that Mr. Anderson was on the boat." We are of the opinion that no prejudicial error was committed. There is evidence in the record that Anderson was seen aboard the boat.

There is complaint of other remarks by the court. We have examined the record, and while some of the remarks were not necessary, still there is no prejudicial remark which would justify a reversal. Other questions were put by the court, to which no objections were offered by the defendant, and this court will not consider them as being properly before us.

There remains one further objection of the defendant to be considered, and that is that the judgment should be reversed upon the ground that it exceeds the ad damnum by \$1,656.35. The judgment is for \$7,656.35, and the ad damnum laid in the plaintiff's declaration is for the sum of \$6,000. This question was not raised in the trial court, except that it was claimed that the damages were excessive. Upon this question in the case of The Jones & Laughlin Steel Company v. Andrew J. Graham, 273 Ill. 377, the court said:

"The ad damnum laid in the declaration was \$2,500. The judgment was for \$2,712.32, and on this ground it is claimed the judgment should be reversed. The judgment was for the correct amount of principal and interest due upon the notes at the time the judgment was rendered June 11, 1913. This question does not appear to have been specifically raised in the trial court. It cannot

advised the jury that it had no opinion, and that the reversal of the court under the circumstances did not have a prejudicial effect upon the jury.

Another complaint is with reference to the court's question during the examination of the witness Andrew A. Akins, "What right was it for him to go to the bank?" and the court's answer, "With a check." and changed the court's question to, "What right was it for him to go to the bank?" as one of the questions that no prejudicial error was committed. There is evidence in the record that Andrew was seen about the bank.

There is complaint of other remarks by the court. We have examined the record, and while some of the remarks were not necessary, still there is no prejudicial effect upon the jury. Other questions were put by the court, to which no objections were offered by the defendant, and this court will not consider them as being prejudicial to the defendant.

There remains one further objection of the defendant to be considered, and that is that the judgment should be reversed upon the ground that it exceeds the ad damnum by \$1,000.00. The judgment is for \$7,000.00, and the ad damnum laid in the plaintiff's declaration is for the sum of \$5,000. This question was not raised in the trial court, except that it was claimed that the damages were excessive. Upon this question in the case of The Jones & Smith v. Steel Company v. United States, 275 Ill. 377, the court said:

"The ad damnum laid in the declaration was \$5,000. The judgment was for \$7,000, and an error was said to be committed. The judgment should be reversed. The plaintiff was the owner of the property and the defendant was the insurer. The judgment was for the sum of \$7,000, and the ad damnum was \$5,000. This question was not raised in the trial court, except that it was claimed that the damages were excessive. Upon this question in the case of The Jones & Smith v. Steel Company v. United States, 275 Ill. 377, the court said:

now be urged as a ground for reversal. *Utter v. Jaffray & Co.*, 114 Ill. 470; *Metropolitan Accident Ass'n. v. Froiland*, 161 id. 30; *Grand Lodge A.O. U.W. v. Bagley*, 164 id. 340; *Prairie State Loan Ass'n. v. Corrie*, 167 id. 414; *Wheatley, Buck & Co. v. Chicago Trust and Savings Bank*, id. 480; *Leathe v. Thomas*, 218 id. 346."

The record discloses that after a discussion between the court and counsel, it was agreed that 5% of \$5,000 from October 11, 1919 to May 26, 1930, which is 10 years, 7 months and 15 days, amounts, in the aggregate, to the sum of \$2,656.25, and the court instructed the jury that if they found for the plaintiff, the correct amount of damage was \$7,656.25, to which the defendant did not object. And again, there is no assignment of error in that the judgment exceeds the ad damnum. The Supreme Court in the case of The Prairie State Loan and Building Association v. Henry Corrie, 167 Ill. 414, said:

"It is said that error was committed by the trial court in rendering judgment on the verdict, because it awarded a sum in excess of the ad damnum laid in the declaration. We do not consider that this point was raised below. The assignment of error is simply that 'the verdict is excessive.' The objection that a verdict exceeds the ad damnum cannot be raised in this manner. Whether a verdict is excessive is a question to be decided by the court, as a matter of sound discretion, from all the facts and circumstances of the case. If the verdict exceeded the ad damnum, there is no doubt, had that fact been clearly pointed out, the court would have unhesitatingly corrected it. It should have been specially stated in the objection that the amount of the verdict exceeded the ad damnum. *Utter v. Jaffray*, 114 Ill. 470; *Metropolitan Accident Ass'n. v. Froiland*, 161 id. 30."

For the reasons indicated, we find no error which would justify this court in reversing the judgment, and accordingly, the judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

has no right in a house for himself. When a. letter
 is sent to the court, the court is not bound to
 receive it. The court is not bound to receive
 a letter from a party who is not a party to the
 case. The court is not bound to receive a letter
 from a party who is not a party to the case.

The record shows that after a discussion between

the court and counsel, it was agreed that \$5 of \$1,000 from October
 11, 1918 to May 30, 1920, which is 10 years, 7 months and 15 days,
 amount, in the aggregate, to the sum of \$3,368.75, and the court

instructed the jury that if they found for the plaintiff, the correct
 amount of damages was \$3,368.75, to which the defendant did not

object. And again, there is no assignment of error in that the
 judgment exceeds the ad damnum. The Supreme Court in the case of

The People State Bank and Building Association v. Henry Smith.

107 Ill. 424, 34 N.E. 1011.

"It is said that error was committed by the trial
 court in reversing judgment on the verdict, because it
 rendered a sum in excess of the ad damnum laid in the
 declaration. It is not correct that this error was raised
 before the reversal of every judgment. The objection that a verdict
 exceeds the ad damnum cannot be raised in this manner.
 Whether a verdict is excessive is a question to be
 decided by the court, as a matter of sound discretion.
 From all the facts and circumstances of the case, it
 the verdict exceeded the ad damnum, there is no doubt.
 And that fact has already been stated, and the court would
 have undoubtedly corrected it. It should have been
 specially stated in the opinion that the amount of the
 verdict exceeded the ad damnum. Green v. Talley, 114
 Ill. 470; Northwestern National Bank v. Tullman, 121
 Ill. 307."

For the reasons indicated, we find no error which

would justify this court in reversing the judgment, and accordingly,
 the judgment is affirmed.

FOR THE COURT.

35429

PEOPLE OF THE STATE OF ILLINOIS,
ex rel, AGNES CHILDS,

Appellant,

v.

HONORABLE HENRY MORNER, JUDGE OF
THE PROBATE COURT OF COOK COUNTY
ILLINOIS, and LOTTIE A. KINSEY
and EDWARD J. WILSON, as Executors
of and under the last will and
Testament of Louis A. Kinsey,
Deceased,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

267 I.A. 597

Opinion filed June 15, 1932

MR. PRESIDING JUSTICE REBEL delivered the opinion of the court.

This is an appeal by the relatrix from an order dismissing the petition after the Court had refused to entertain relatrix' motion for leave either to amend the verification of her petition, or to file an amended petition as of July 13, 1931.

The relatrix filed a petition praying for a writ of mandamus directing and commanding the Honorable Henry Morner, as Judge of the Probate Court, to enter an order in the estate of Louis A. Kinsey, deceased, setting aside, vacating and expunging the orders of May 1 and May 14, 1931, entered by the judge of the Probate Court in said estate, and for an order directing the executors of said estate to pay to relatrix forthwith the amount of relatrix' claim allowed as of November 22, 1929. The motion of the defendants to strike certain paragraphs and certain parts of paragraphs and to dismiss the petition, was allowed by the court.

The principal question to be considered is, did the Probate Court have jurisdiction to vacate the order allowing relatrix' claim for \$15,514, against the estate of Louis A. Kinsey after term time? The rule controlling is to the effect that the Probate Court in this county and in the County court exercising probate jurisdiction in other counties in this state have general



STATE OF ILLINOIS

COUNTY OF COOK

IN SENATE

287 I.A. 337

REPORT OF THE STATE OF ILLINOIS
ON THE STATE OF THE

COMMISSIONER

HONORABLE HENRY HARRIS, JUDGE OF
THE SUPREME COURT OF THE STATE OF
ILLINOIS, and JAMES A. KIRNEY,
and others, vs. HARRIS, as executor
of and under the last will and
testament of James A. Harris,
deceased.

Appellants,

Opinion filed June 15, 1938

MR. JUSTICE HARRIS delivered the opinion of the court.

This is an appeal by the relatrix from an order

dissolving the petition after the court had refused to entertain
relatrix' motion for leave either to amend the verification of her
petition, or to file an amended petition as of July 27, 1937.

The relatrix filed a petition praying for a writ of
mandamus directing and compelling the respondent's deputy clerk, as
judge of the Probate Court, to enter an order in the estate of
Louis A. Harris, deceased, assigning value, settling and distributing
the assets of his last will and testament, entered by the judge of the
Probate Court in said estate, and for an order dissolving the
execution of said estate to pay to relatrix forthwith the amount
of relatrix' claim allowed as of November 22, 1933. The motion of
the respondents to strike certain paragraphs and certain parts of
paragraphs and to dissolve the petition, was denied by the court.
The respondent petitioned as he was entitled to, all the
Probate Court have jurisdiction to grant the order dissolving
relatrix' claim for his share, against the estate of Louis A. Kinney
after term time. The rule controlling is so the effect that the

and unlimited jurisdiction in matters of administration, exercising such equity powers as are adapted to its organization and mode of proceeding, and it is held as law by the Supreme Court in the case of Schlink v. Maxton, 153 Ill. App. 447, that such a court, in the exercise of its equitable jurisdiction, may, upon motion, at a subsequent term, set aside its own order allowing a claim against an estate if a mistake or fraud has intervened. This rule has been followed by the Appellate Court in the case of St. Rose of Lima Congregation v. The Estate of Anna Hopkins, Deed. 201 Ill.App. 316.

The relatrix contends, however, and admits that the Probate Court, or the County Court, as the case may be, has jurisdiction to vacate an order allowing a claim whenever a court of equity would have jurisdiction on a bill to set aside a judgment taken at a previous term where fraud or mistake has intervened, but that in the instant case no fraud or mistake is alleged, therefore the Probate Court was without power to vacate the order allowing relatrix' claim against said estate. The answer to this contention is that where the court has jurisdiction to entertain a motion to vacate such an order^{as}/the one in question, the court is empowered to pass upon the questions of fact submitted in support of this motion, and in exercising its judicial power in making a final disposition of the motion.

The petition of Lottie A. Kinsey and Edward J. Wilson as Executors of the Estate of Louis A. Kinsey, deceased, is to vacate the allowance of the relatrix' claim, and the allowance was set aside upon the petition and the facts therein contained, and it may be that the facts in the petition were not sufficient to justify the order entered by the court, still the order was entered by the Judge of the Probate Court in the exercise of judicial discretion,

and unlimited jurisdiction in matters of administration, exercising
such equity powers as are accorded to its organization and mode of
proceeding, and it is held as law by the Supreme Court in the case
of Bohling v. Weston, 185 Ill. App. 467, that such a court, in the
exercise of its administrative jurisdiction, may, upon motion, at a
subsequent term, set aside its own order allowing a claim against
an estate if a mistake or fraud has intervened. This rule has been
followed by the Appellate Court in the case of Mc. Ross of Illinois
Bohling v. Weston, 185 Ill. App. 467, and it is held that the
relaxing court, properly, and admits that the
Probate Court, of the County Court, as the same may be, has juris-
diction to vacate an order allowing a claim whenever a court of
equity would have jurisdiction on a bill to set aside a judgment
made at a hearing from which an estate was interested, and
that in the instant case no fraud or mistake is alleged, therefore
the Probate Court was without power to vacate the order allowing
relatrix' claim against said estate. The answer to this contention
is that where the court has jurisdiction to entertain a motion
to vacate such an order, the court is empowered
to pass upon the question of fact submitted in support of this
motion, and in exercising its judicial power in making a final
disposition of the matter.

The petition of Bohling v. Weston and Bohling v. Weston
as presented to the Estate of Lewis A. Kinney, deceased, is to
vacate the allowance of the relatrix' claim, and the allowance was
set aside upon the petition and the facts therein contained, and it
may be that the facts in the petition were not sufficient to justify
the order entered by the court, still the order was entered by the
Judge of the Probate Court in the exercise of judicial discretion,

and the sufficiency of the petition is not involved in the proceedings before us on this appeal. The order entered by the Probate Court having jurisdiction may be erroneous, but not void. Therefore the order is not before this court for determination in a mandamus proceeding.

Other questions have been called to our attention, but we regard our conclusion as determining the right of the relatrix to the order prayed for in her petition. The order of the trial court is accordingly affirmed.

Having passed upon the merits of this controversy, it will not be necessary to consider the motion reserved for the final hearing.

ORDER AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

and the necessity of the position is not involved in the type-
writing being as in this case. The matter referred to the Chinese
Board having jurisdiction and the evidence, and the fact that the
the order is not within this order the determination in a manner
possible.

Great attention has been called to the evidence, and
we expect our committee to determine the right of the majority
to the order being in the position. The order of the Bill
must be accordingly altered.

Should leave your the office of this committee, it
will not be necessary to discuss the action received for the
first period.

ORDER REVISED.

ORDER REVISED, 11, 1900.

35457

WILLIAM RUBENSTEIN,

Appellee,

v.

JACOB RIBAYSEN,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

267 I.A. 597

Opinion filed June 15, 1932

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

Jacob Ribaysen, the defendant, prosecutes this appeal from a judgment of \$3,000 entered against him in favor of William D. Rubenstein, the plaintiff, in the Circuit Court of Cook County. The judgment was entered upon a verdict of the jury finding the defendant guilty in an action for damages in alienating the affections of plaintiff's wife in the amount appealed from.

The defendant is the father of Regina Rubenstein, plaintiff's former wife. This suit was tried twice, the first time resulting in a verdict in favor of plaintiff in the sum of \$5,000, and the granting of a new trial; and the second time in a verdict for \$3,000 in favor of the plaintiff, from which judgment the case is now pending in this court on appeal.

The first question to be considered is, was the verdict and judgment contrary to the law and the manifest weight of the evidence?

The facts as they appear in the record are substantially, that the plaintiff and Regina Ribaysen were married on February 28, 1926, and after their marriage resided a few blocks from the home of the defendant and his wife. A child, Albert Rubenstein, was born of this marriage on March 28, 1927, and it may be presumed that the plaintiff had the affection of his wife. There was a separation between the plaintiff and his wife on December 30, 1928, and subsequently a divorce decree was granted to the plaintiff's wife,

STATE

CLERK OF SUPERIOR COURT

IN SENATE

V.

ALBION ALPHEUS

Defendant.

STATE OF MINNESOTA.

367 A. 293

Opinion filed June 15, 1933

MR. JUSTICE ROBERTS delivered the opinion of the court.

ALBION ALPHEUS, the defendant, recovered this appeal from a judgment of \$2,000 entered against him in favor of William W. Hildebrandt, the plaintiff, in the circuit court at Cook County.

The judgment was entered upon a verdict of the jury finding the defendant guilty in an action for damages in alienating the affection of plaintiff's wife in the amount specified there.

The defendant is the father of Regina Hildebrandt, plaintiff's former wife. This suit was tried twice, the first time resulting in a verdict in favor of plaintiff in the sum of \$2,000, and the granting of a new trial; and the second time in a verdict for \$2,000 in favor of the plaintiff, from which judgment the case is now pending in this court on appeal.

The first question to be considered is, was the verdict and judgment contrary to the law and the manifest weight of the evidence?

The facts as they appear in the record are substantially that the plaintiff and Regina Hildebrandt were married on February 28, 1928, and after their marriage resided a few blocks from the home of the defendant and his wife. A child, Albert Hildebrandt, was born of this marriage on March 28, 1927, and it may be presumed that the plaintiff had the affection of his wife. There was a conversation

Regina Rubenstein, based upon the evidence of acts of cruelty by the plaintiff in this case, William Rubenstein. There is also evidence that the attitude of Regina Rubenstein, wife of the plaintiff, changed toward the plaintiff after June, 1927. Previously she was a loving and affectionate wife, and as a result of this change of attitude the separation occurred. It also appears from the record that a conference was had to effect a reconciliation, but without avail. There is evidence of business disputes between the plaintiff and the defendant in which it seems that certain relatives participated. There is evidence of the plaintiff which tends to show that at a conference in May or June, 1927, the defendant, in the presence of the plaintiff's wife, the daughter of this defendant and others, threatened to take his daughter from the plaintiff unless plaintiff would consent to the defendant's wishes in certain business affairs in which the plaintiff and the defendant were interested, and that other threats of like character were made prior to the winter of 1928. However, the jury had before it the facts, and upon plaintiff's evidence, together with that offered by the defendant, including his denial of any threats, returned the verdict in question.

The evidence in the instant case supports the verdict of the jury and is not against the manifest weight of the evidence. It also appears that the instant case is a second trial of this controversy, and that this jury found, as the jury did in the first trial, for the plaintiff.

The defendant complains that the trial court erred in the admission of certain evidence offered by the plaintiff and the exclusion of certain evidence offered by the defendant. The defendant contends that the court erred in the admission of evidence

Regina Hohenstein, based upon the evidence of both of myself and the plaintiff in this case, William Hohenstein. There is also evidence that the attitude of Regina Hohenstein, wife of the plaintiff, towards the defendant after June, 1937, was such that she was a loving and affectionate wife, and as a result of this change of attitude the defendant's reputation was improved. It also appears from the record that a conference was had to effect a reconciliation, but without avail. There is evidence of business disputes between the plaintiff and the defendant in which it seems that certain relatives participated. There is evidence of the plaintiff which tends to show that at a conference in May or June, 1937, the defendant, in the presence of the plaintiff's wife, the daughter of this defendant and others, threatened to take his daughter from the plaintiff unless plaintiff would consent to the defendant's wishes in certain business affairs in which the plaintiff and the defendant were interested, and that other threats of like character were made prior to the winter of 1937. However, the jury had before it the fact that the plaintiff's wife, Regina Hohenstein, returned the defendant, including his denial of any threats, returned the verdict in question.

The evidence in the instant case supports the verdict of the jury and is not against the manifest weight of the evidence. It also appears that the instant case is a second trial of this controversy, and that this jury found, as the jury did in the first trial, for the plaintiff.

The defendant complains that the first court erred in the admission of certain evidence offered by the plaintiff and the exclusion of certain evidence offered by the defendant.

offered by the plaintiff of certain business transactions between the plaintiff and the defendant which caused the jury to believe that the defendant had swindled the plaintiff in the sum of \$30,000. It is to be regretted that the defendant failed to specifically point out such evidence so that this court could fairly pass upon this question. It is admitted, however, by the defendant that the trial court limited such evidence offered by the plaintiff, and it is further admitted that it was proper for the plaintiff in the instant case to show that there were business differences between the plaintiff and the defendant, and that the defendant made these differences the occasion for alienating his daughter's affection from the plaintiff. This court will assume that the trial court had this rule in mind in passing upon the admissibility of evidence. We have considered the evidence objected to by the defendant, and when all the evidence in the record is considered, the trial court did not err in admitting such evidence.

The fact that the court permitted the plaintiff to show that the defendant sued the plaintiff on a note in the summer of 1928, prior to the separation, is not such error as would justify a reversal, in view of the fact that the defendant's counsel made a statement in the presence of the jury to the effect that the plaintiff had filed a certain suit against the defendant for the sum of \$100,000. Certain other evidence is objected to by the defendant, such as the testimony of the plaintiff that he had communicated with his wife after the separation, but did not testify as to the conversation that was had, and the admission of evidence of checks having been signed by the former wife and drawn on the plaintiff's account was a reply to one of the defenses of the defendant that the plaintiff did not support his wife; that the defendant aided his wife in the divorce matter, and also to the statement of defendant's

account was a reply to one of the defenses of the defendant that having been signed by the former wife and given on the plaintiff's conversation that was had, and the admission of evidence of checks with his wife after the separation, but did not testify as to the fact, such as the testimony of the plaintiff that he had communicated sum of \$100,000. Certain other evidence is objected to by the defendant plaintiff had filed a certain suit against the defendant for the statement in the presence of the jury to the effect that the a reversal, in view of the fact that the defendant's counsel made of 1932, prior to the separation, is not such error as would justify show that the defendant used the plaintiff as a wife in the summer The fact that the court permitted the plaintiff to did not sit in admitting such evidence. when all the evidence in the record is considered, the trial court We have considered the evidence objected to by the defendant, and this rule in mind in passing upon the admissibility of evidence. from the plaintiff. This court will assume that the trial court had dismissed the occasion for allowing his daughter's attention the plaintiff and the defendant, and that the defendant made these looked over to show that there were no other differences between it is further admitted that it was proper for the plaintiff in the trial court limited such evidence offered by the plaintiff, and this question. It is admitted, however, by the defendant that the point out such evidence as that this court could fairly pass upon It is to be regretted that the defendant failed to successfully that the defendant had withheld the plaintiff in the sum of \$50,000. the plaintiff and the defendant which caused the jury to believe offered by the plaintiff of certain business transactions between

wife to the effect that she did not approve of plaintiff as a son-in-law. It would seem that this evidence objected to was made in the presence of the defendant, and not contradicted. We have considered all these objections, but are not convinced that there is reversible error in the admission of this evidence. Again, the defendant urges that the court erred in refusing to permit plaintiff's former wife to testify as a witness. It would seem from the defendant's brief that the former wife was to testify to matters occurring during the married life of the parties. It is the rule that a wife is not a competent witness, both at common law, and by the statutory provisions of our state statutes, Chap. 51, Sec. 5, Cahill's Ill. Rev. Stats. to testify to matters occurring during their married life, or to admissions made by the husband, except in certain cases. If the wife is to be made a competent witness for or against her husband, the law making bodies are the proper bodies to make such a change, and until that is done, the court will adhere to the law in this respect, and therefore the court properly ruled that the wife was an incompetent witness in the instant case.

It is claimed that the plaintiff's attorney made certain prejudicial remarks in his final argument to the jury. Reference was made by the plaintiff's attorney to a previous trial. Upon objection, the court instructed the jury to disregard what was said about a previous trial. It does not appear that the result of the former trial was mentioned, and in view of the prompt action of the trial court, no harm was done in this case.

The defendant also objected to certain statements made in plaintiff's argument to the jury, which objections were properly sustained by the trial court and the jury was advised to disregard the remark. But plaintiff's counsel, in reply to the defendant's

...to the effect that she did not approve of plaintiff as a son-in-law. It would seem that this evidence objected to was made in the presence of the defendant, and not contradicted. We have considered all these objections, but we are not convinced that there is reversible error in the admission of this evidence. Again, the defendant urges that the court acted in refusing to permit plaintiff's former wife to testify as a witness. It would seem from the testimony that the former wife was to testify to matters occurring during the married life of the parties. It is the wife that a wife is not a competent witness, both at common law, and by the statutory provisions of our state. In *State v. ...*, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

contention, calls the attention of the court to the fact that certain of his remarks were made in reply to defendant's attorney's argument when he made his plea to the jury. Upon an examination of the record, the argument of defendant's counsel is not included in the bill of exceptions, and so we are unable to determine from the record whether the plaintiff's attorney was justified in his reply or not.

Another objection of the defendant to be considered by this court is whether the court erred in giving, refusing and modifying certain of the instructions. The defendant contends that the instruction to the effect that if plaintiff was cruel to his wife and such cruelty was the controlling cause of her leaving plaintiff, then no inference should be drawn against the defendant because plaintiff's wife had divorced the plaintiff. However, it would seem to be the rule that notwithstanding the plaintiff was cruel and his wife obtained a divorce, the decree is not decisive on the question of the defendant's liability, but is evidence to be considered by the jury in passing upon the question involved in this controversy, together with all the other evidence in the record.

The next instruction objected to is one tendered by the plaintiff, which instructed the jury that in determining the credibility of the witnesses and the weight of the evidence, they may consider, among other rules to be applied, the apparent intelligence of the witnesses, or the lack of it. The defendant contends that it is a novel doctrine that makes intelligence a criterion of veracity. This criticism to the instruction as given is not justified when we consider that further tests are also to be applied by the jury to the witnesses testifying, such as their appearance and conduct, the apparent truth of their testimony, or the lack of it, and also the opportunity of knowing or seeing the facts, or

contestation, calls the attention of the court to the fact that certain of his remarks were made in reply to defendant's attorney's argument when he made his plea to the jury. Upon an examination of the record the argument of defendant's counsel is not included in the bill of particulars, and so we are unable to determine from the record whether the plaintiff's attorney was justified in his reply or not.

Another objection of the defendant to be considered by this court is whether the court erred in giving, refusing and modifying certain of the instructions. The defendant contends that the instruction to the effect that if plaintiff was cruel to his wife and such cruelty was the controlling cause of her leaving plaintiff, then no inference should be drawn against the defendant because plaintiff's wife had deserted the plaintiff. However, it would seem to be the rule that notwithstanding the plaintiff was cruel and she obtained a divorce, the degree is not decisive on the question of the defendant's liability, but is evidence to be considered by the jury in passing upon the questions involved in this controversy, together with all the other evidence in the record. The next instruction objected to is one regarding the credibility of the witnesses and the weight of the evidence, they may consider, among other rules to be applied, the apparent intelligence of the witnesses, on the lack of it. The defendant contends that it is a well settled rule that unless intelligence is shown of veracity. This objection to the instruction as given is not justified when we consider that further facts are also to be applied by the jury to the witness testimony, such as their appearance

the absence of such opportunity, and their interest in the result of the case, and from all such facts shown by the evidence, the jury must pass upon ^{and} / decide the question of weight or the preponderance of the evidence. This applies to all the witnesses heard by the jury. The instruction fairly states the rule by which the jury is to be guided in its deliberation, and the court properly instructed the jury upon this point.

While other objections are made by the defendant, we have considered the instructions, and are satisfied that the jury was fairly instructed by the court.

The Supreme Court in the case of Lebers v. Lebers, 177 Ill. 82, where there had been more than one trial of the cause of action before a jury, made a pertinent statement, which applies with equal force to the case before us, and is as follows:

"There were two trials, and the verdicts of both juries were the same, and while it may appear from the record before us that the proponents made out the stronger case on the facts, it must be considered that the jury and the court below saw and heard the witnesses and had better means of weighing their testimony than we have. We cannot upon the record say that the verdict was manifestly wrong or against the evidence, and while we might have been better satisfied from the evidence in the record with a different verdict, the rule of this court has long been not to interfere with the verdict in such cases. And especially should this rule be adhered to where a second trial has produced the same result."

This court is satisfied that there is no reversible error in the record, and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

juror must not be asked to give an opinion as to the guilt of the accused, and the court properly instructed the jury upon this point.

THE UNITED STATES OF AMERICA
DO hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the Department of the Interior.

III. 53, where there had been more than one trial of the same of action before a jury, with a verdict returned, which would give equal force to the same before us, and as follows:

"There was the same result."

It is the policy of the Government to encourage the development of the private sector in the economy, and the Government is accordingly committed to the principle of free enterprise.

• 673-21176 727-30, 1/76.

PHILLIPS, CL. *WINDS OF THE FUTURE*

35466

THE PEOPLE OF THE STATE OF
ILLINOIS, ex rel. HAZEL
SCHROEDER,

Appellant,

v.

EDMUND SCHULTZ,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 597⁴

Opinion filed June 15, 1932

MR. PRESIDING JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the People of the State of Illinois, ex rel, Hazel Schroeder from an order finding the defendant not guilty in a bastardy proceeding entered in the Municipal Court of Chicago upon a hearing had before the court, without a jury, a jury being waived by the defendant.

The relatrix charged in her complaint, and offered proof upon a hearing thereof, that the defendant was the putative father of her bastard child. She testified to the effect that she met the defendant in 1926, and met him every Sunday thereafter until February, 1927; that after this date she met him two or three times a week during the years 1927, 1928 and 1929, and had sexual relations with the defendant, and that she is a single woman. The defendant took her to a doctor in April, 1930, who advised her that she was in a pregnant condition and had been for a period of five months; that she never had any intimate relations with any other man in 1929, or a year prior to the birth of the child. The child was born and is still living. She received \$275 from the defendant on June 21, 1930, and on that day executed a written agreement in substance that she released the defendant of any and all claims she might have against him.

There is evidence by the relatrix that she accepted the \$275 with the understanding that the matter was not settled;



Opinion filed June 13, 1932
 267 I.A. 597

This is an appeal by the people of the State of Illinois, ex rel. Samuel Hoffmeyer from an order granting the defendant not guilty in a case arising out of the Honorable Court of Chicago upon a hearing had before the court, without a jury, a jury being waived by the defendant.

The relatrix charged in her complaint, and offered proof upon a hearing thereat, that the defendant was the father of her bastard child. She testified to the effect that she met the defendant in 1926, and met him every Sunday thereafter until February, 1927; that after this date she got him two or three times a week during the years 1927, 1928 and 1929, and had sexual relations with the defendant, and that she is a single woman. The defendant took her to a doctor in April, 1930, who advised her that she was in a pregnant condition and had been for a period of five months; that she never had any intimate relations with any other man in 1929, or a year prior to the birth of the child. The child was born and is still living. She received \$75 from the defendant on June 21, 1930, and on that day executed a written agreement in substance that she released the defendant of any and all claims she might have against him.

that she had to meet the expenses in connection with the birth of the child, and that she did not consider that the defendant was released from supporting the child. This is substantially the evidence heard by the trial court, and on motion of the defendant, the court entered the judgment appealed from.

This evidence appearing in the record, and uncontradicted, is sufficient for the court to have found that the defendant is the putative father of this child. The only other evidence in the record is the so-called release signed by the relatrix. The terms of this agreement were not approved in writing by a judge of the court having jurisdiction, and it is therefore contended that a release of the putative father by the mother for a sum less than \$800 in the absence of a consent in writing by a court of competent jurisdiction does not bar bastardy proceedings. This position by the relatrix is fully sustained by Chap. 17, Sec. 18, Cahill's Rev. Stats. in these words:

"The mother of a bastard child before or after its birth, may release the reputed father of such child from all legal liability on account of such bastardy, upon such terms as may be consented to in writing by the judge of the court having jurisdiction herein of the county in which such mother resides: Provided, a release obtained from such mother in consideration of a payment to her of a sum of money less than eight hundred dollars in the absence of the written consent of the judge of the court having jurisdiction herein, shall not be a bar to a suit for bastardy against such father, but if, after such release is obtained, suit be instituted against such father and the issue be found against him, he shall be entitled to a set-off for the amount so paid, and it shall be accredited to him as of the first payment or payments: And, provided further, that such father may compromise all his legal liability on account of such bastard child, with the mother thereof, without the written consent of such judge, by paying to her any sum not less than eight hundred dollars."

For the reasons stated, we are of the opinion that the trial court erred in entering the judgment appealed from, and accordingly the judgment so entered is reversed and the case remanded with directions to the Municipal Court of Chicago that

that she had to meet the expense in connection with the birth of the child, and that she did not consider it the defendant's released from supporting the child. This is substantially the evidence heard by the trial court, and on motion of the defendant, the court entered the judgment appealed from.

This evidence appearing in the record, and necessarily stated, is sufficient for the court to find that the defendant is the putative father of this child. The only other evidence in the record is the so-called release signed by the plaintiff. The terms of this agreement were not approved in writing by a judge of the court having jurisdiction, and it is therefore considered that a release of the putative father by the mother for a sum less than \$500 in the absence of a consent in writing by a court of competent jurisdiction does not bar recovery hereafter. This position by the plaintiff is fully sustained by Cases 17.

Case 18, 1891, 1892, in these cases:

"The mother of a bastard child before us filed the following legal liability on account of such bastardy, and such return as may be considered to be within the scope of the court having jurisdiction within all the terms of which good money received; provided, a release of the child from such mother as consideration of a payment of \$500. A sum of money less than \$500 having been paid in the absence of the written consent of the judge of the court having jurisdiction over it, shall not be a valid release in criminal, civil or in any other court. And, provided further, that such father may recover all his legal liability on account of such bastard child, with the mother thereof, without the written consent of such judge, or judge of the court having jurisdiction over it, shall not be a valid release."

For the reasons stated, we are of the opinion that the trial court erred in entering the judgment appealed from, and

the judgment heretofore entered be expunged and set aside, and judgment be entered against the defendant in accordance with the statute in such case made and provided, and that he make the several payments provided for by law and be credited with the payment of \$275 made to the relatrix, on the several amounts to be paid by the defendant, and for such further and other orders, not inconsistent with the views herein expressed by this court.

REVERSED AND REMANDED WITH DIRECTIONS.

FRIEND AND WILSON, JJ. CONCUR.

The judgment rendered against the defendant was affirmed, and the
defendant was ordered to pay the costs of the proceedings with the
costs in this case and provided, and that he was to be
restored to his former position by the law and be provided with the
payment of this case to the plaintiff, in the several amounts to be
paid by the defendant, but for costs before and after judgment, and
incidental with the said costs of this case.

WITNESSES AND JUDGES WITH TESTIMONY.

WITNESSES AND JUDGES, TO WIT:

James M. Smith, Esq., of the County of ... State of ...
do hereby certify that the within and foregoing is a true and correct
copy of the original of the same as the same appears from the
records of the Court of the County of ... State of ...
this 10th day of ... A.D. 18...

James M. Smith, Esq., Clerk of the Court.

Witness my hand and seal of office this 10th day of ... A.D. 18...

James M. Smith, Esq., Clerk of the Court.

35600

PAUL SCHIEVEN,

Appellee,

v.

HERMANN P. HAASE,

Appellant.

7 7
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 598¹
JUNE

Opinion filed June 15, 1932

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in the Municipal Court of Chicago, in the sum of \$200 in favor of the plaintiff.

Plaintiff filed a statement of claim in which he alleges that on October 15, 1930, he entered into an agreement with the defendant whereby the defendant agreed to pay the plaintiff \$200 for services in investigating a personal injury case for the defendant, who represented a certain claimant in said case; that plaintiff rendered services in investigating said claim, interviewing witnesses, securing statements of witnesses, procuring the name of the driver of the automobile involved in the accident, and otherwise preparing the case in accordance with the orders of the defendant; that the case was subsequently settled for the sum of \$8,000, and the defendant refused to pay the plaintiff the sum of \$200 for services rendered.

It appears that the plaintiff in the instant case is co-guardian of Tony Urbin, and was appointed before the settlement of the personal injury claim; that thereafter the plaintiff was ordered as a co-guardian of the estate to pay the defendant a sum not to exceed 25% of the settlement, and, as a result of such settlement, paid the defendant \$2,000, being 25% of the \$8,000, the amount for which said claim was settled.

2671A. 298

Opinion filed June 15, 1933

This is an appeal by the defendant from a judgment entered in the Municipal Court of Chicago, in the sum of \$200 in favor of the plaintiff.

Plaintiff filed a statement of claim in which he alleged that on October 10, 1932, he entered into an agreement with the defendant whereby the defendant agreed to pay the plaintiff \$200 for services in investigating a personal injury case for the defendant, who represented a certain claim in said case; that plaintiff rendered services in investigating said claim, interviewing witnesses, securing statements of witnesses, procuring the name of the driver of the automobile involved in the accident and otherwise preparing the case in accordance with the order of the defendant; that the case was subsequently settled for the sum of \$2,000, and the defendant refused to pay the plaintiff the sum of \$200 for services rendered.

It appears that the plaintiff in the instant case is co-guardian of Tony Urban, and was appointed before the settlement of the personal injury claim; that thereafter the plaintiff was ordered as co-guardian of the estate to pay the defendant a sum not to exceed 2% of the settlement, and as a result of such settlement, said the defendant \$2,000, being 2% of the \$2,000.

The defendant is a practicing attorney, living in the City of Chicago, and was the attorney for the claimant in the personal injury matter. It appears from the evidence that the defendant admitted that he agreed to pay the plaintiff for services in investigating and obtaining the names of witnesses. The conflict is as to the amount agreed upon. After a dispute as to such payment the suggestion was made that the amount to be paid by the defendant to the plaintiff be submitted to arbitration, but such submission while talked of was never carried out.

The question raised by the defendant is that the finding and judgment of the court is contrary to the manifest weight of the evidence. The court heard the testimony, saw the witnesses, passed upon their credibility and determined that the plaintiff had established his case by a preponderance of the evidence. From an examination of the record, the evidence is sufficient, and the trial court is fully sustained in its conclusion that the plaintiff established his claim by a preponderance of the evidence.

The defendant also contends that the agreement of employment is illegal and void as against public policy in that it tends to impede justice and cites the case of Woodrich v. Lannay, et al, 144 Ill. 423 in support of his position. We have examined the defendant's testimony, as well as that of the plaintiff, and it does not appear that the agreement of the parties is tinged with an illegal motive, or was entered into for a unlawful purpose in the work to be performed by the plaintiff, or to prevent the course of justice or its pure administration; or was one in violation of public policy.

The only other objection by the defendant to be considered by the court is that the agreement is illegal in that it tends

The defendant is a practicing attorney, living in the City of Chicago, and was the attorney for the plaintiff in the personal injury matter. It appears from the evidence that the defendant admitted that he agreed to pay the plaintiff for services in investigation and obtaining the names of witnesses. The complaint is as to the amount of money paid. After a hearing on the complaint the suggestion was made that the amount to be paid by the defendant to the plaintiff be submitted to arbitration, but such suggestion while talked of was never carried out.

The question raised by the defendant is that the finding and judgment of the court is contrary to the manifest weight of the evidence. The court heard the testimony, saw the witnesses, passed upon their credibility and determined that the plaintiff had established his case by a preponderance of the evidence. From an examination of the record, the evidence is sufficient, and the trial court is fully sustained in its conclusion that the plaintiff established his claim by a preponderance of the evidence.

The defendant also contends that the agreement of assignment is illegal and void as against public policy in that it tends to impede justice and after the case of Hambrick v. Hambrick, et al., 144 Ill. 423 in support of his position, he has examined the defendant's testimony, as well as that of the plaintiff, and it does not appear that the agreement of the parties is tainted with an illegal motive, or was entered into for a malicious purpose in the work to be performed by the plaintiff, or to prevent the course of justice on the mere administration; or was one in

violation of public policy.

The only other objection by the defendant to be considered

to cause the plaintiff to violate his duty to his ward because of an indirect benefit. The agreement was entered into by the plaintiff and the defendant before the defendant was appointed a co-guardian by the Probate Court of Cook County, and the agreement was with the defendant to do this work and was his personal obligation and is not a charge against the minor's estate. As a matter of fact the Probate Court was advised of this agreement when the defendant attempted to have the court allow this sum of \$300 as a claim against this estate. The Hon. Henry Horner, Judge of the Probate Court suggested after the plaintiff advised the court that the defendant had hired him, that the defendant in the instant case pay the plaintiff.

We have considered the other objections made, but do not find that any of them are such as would justify a reversal. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

to secure the plaintiff in violation of his duty to his said business of an indirect benefit. The agreement was entered into by the plaintiff and the defendant before the defendant was appointed a guardian by the Probate Court of Cook County, and the agreement was with the defendant to do this work and was his personal obligation and is not a charge against the minor's estate. In a matter at law the plaintiff moved for judgment at law, and when the defendant objected to give the court what this was of this is a claim against the estate. The law being passed, which of the plaintiff's estate suggested after the plaintiff advised the court that the defendant had filed his claim the defendant in the plaintiff was of the plaintiff.

It was considered the other objections made, but he said that that was of the law and was a legal liability - contract. The judgment is accordingly affirmed.

WILLIAM AND WILSON, J.L. HARRISON.

35955

THE CITY OF CHICAGO, a Municipal
Corporation,

Appellee,

v.

EMANUEL RUSSELL,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 598²

Opinion filed June 15, 1932

MR. PRESIDING JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

The form of action in this proceeding is a suit by the City of Chicago, against the defendant named to recover a penalty for an alleged violation of Section 4185, of an ordinance of the City of Chicago, which is set forth in the Revised Code of said City, and is consolidated with Numbers 35956 to 35988, inclusive.

The pleading here involved is a complaint by Murtell F. Parker, a police officer of the City of Chicago, which charges "that the defendant not being a public officer, did unlawfully have in his possession, custody or control, a paper print, writing, numbers, device, policy sheet or article of such kind as are commonly used in carrying on, promoting or playing the game commonly called lottery or policy, in violation of Section 4185" of said ordinance.

This action was instituted in the Municipal Court of Chicago, and after a hearing, the court found the defendants guilty of a violation of the ordinance set forth in the complaint and assessed a fine or penalty against the defendant in the sum of \$50.00.

The defendant contends that he was illegally arrested and searched and calls the attention of the court to a motion and verified petition presented by the defendant to the trial court, in which he maintained that he was arrested and unlawfully searched by a police officer of Chicago without a warrant for that purpose; that he did not violate any ordinance of the City of Chicago in the presence of the police officer of the City and was not guilty

205 A.I. 728

The form of action in this proceeding is a writ by the City of Chicago, against the defendant named to recover a penalty for an alleged violation of Section 4152, of an ordinance of the City of Chicago, which is set forth in the revised Code of said City, and is consolidated with numbers 33886 to 33900, inclusive. The following have been involved in a complaint by Municipal E. J. Barker, a police officer of the City of Chicago, which charges "that the defendant, not being a police officer, did unlawfully have in his possession, custody or control, a secret code, writing, numbers, device, policy sheet or article of such kind as is commonly used in running up, running or playing the game commonly called lottery or policy, in violation of Section 4152 of a 19 ordinance. This action was instituted in the Municipal Court of Chicago, and after a hearing, the court found the defendant guilty of a violation of the ordinance set forth in the complaint and assessed a fine or penalty against the defendant in the sum of \$50.00. The defendant contends that he was illegally arrested and arrested and calls the attention of the court to a motion and verified petition presented by the defendant to the trial court, in which he maintained that he was arrested and unlawfully removed by a police officer of Chicago without a warrant for that purpose.

of a criminal offense at the time of the arrest.

It is the established law that a police officer of a City may arrest without a warrant for that purpose where a person violates a city ordinance of a city in the presence of or within the view of such police officer. This authority of a police officer of a city to so arrest for the violation of a city ordinance is granted by Chap. 84, Par. 88, Cahill's Ill. Rev. Stats. (1931), which paragraph is, in part, as follows:

"The trustees in villages, the mayor, aldermen, and the marshal and his deputies, policemen and watchmen in cities, if any such be appointed, shall be conservators of the peace, and all officers created conservators of the peace by this Act, or authorized by any ordinance, shall have power to arrest or cause to be arrested, with or without process, all persons who shall break the peace, or be found violating any ordinance of the city or village, or any criminal law of the State."

It is also provided in Chap. 37, Par. 438, Fourth Sub-Div. of the Municipal Court Act, Cahill's Ill. Rev. Stats., as follows:

"Any police officer of the City of Chicago may arrest on view any person who may be seen by such police officer in the act of violating, within the City of Chicago, any ordinance of said city, or any ordinance of any municipal corporation, situated, in whole or in part, within the limits of said City, whenever such violation is, by such ordinance, made punishable by fine or otherwise."

The point is not made that this police officer was not a qualified police officer of the City of Chicago. We therefore assume that he was properly qualified and was permitted to act for and on behalf of the city. The charge in the instant case is that the defendant violated a certain ordinance of the City of Chicago. The only question to be determined is, did Murtell F. Parker as a police officer of the City of Chicago arrest the defendant for violating in his presence an ordinance of the City of Chicago, as charged in the complaint filed in this case? The solution of this question is necessarily one of fact, and it appears that the

testimony of Parker, the officer and only witness heard, was considered by the court in passing upon defendant's motion and in entering judgment finding the defendant guilty of a violation of the ordinance described in the complaint, and in assessing a fine against the defendant in the sum of \$50.00.

The facts are that the officer had information that policy, a gambling game, was being played on the third floor of the building known as 126 East 42nd Street, located in Chicago, and upon investigation the officer found that two of the defendants named Russell and Fletcher were patrolling back and forth in front of this building and while doing so passed signals to a man appearing at a front window in an apartment on the third floor of the building, and that men were passing through the entrance into this building; that after observing these two men, Parker, the officer, placed them under arrest and upon searching them found policy tickets, which are a part of this gambling game, in possession of the defendant Russell; that the officer then proceeded to the rear of the building and walked up the back stairs to the third floor landing, and while there the shade or cover of a window was raised and the officer saw the interior of the room, in which was a policy board, which is used in this gambling game, and policy slips on a table, around which were seated a large number of persons. The police officer made his presence known, and demanded that the back door be opened, but this was not done. He then raised with the aid of a screw driver an unlocked window opening into this room; and entered the premises. There were in all 28 men and women in this 4-room apartment, and they were taken into custody by the police officer. Upon a search of the 28 men and women after their arrest, policy tickets and considerable sums of money and silver coin were found on some of the defendants. The closet door was opened and a lot of policy tickets were found in the closet.

testimony of Barker, the officer and only witness on the stand, was corroborated by the court in finding an intent to commit a crime and in entering judgment that the defendant guilty of a violation of the ordinance described in the complaint, and in assessing a fine against the defendant in the sum of \$50.00.

The facts are that the officer had information that policy, a gambling game, was being played on the third floor of the building known as 124 East 62nd Street, located in Chicago, and on investigation the officer found that two of the defendants named Russell and Johnson were participating and that in the

of this building and while being so placed signals to a man appearing at a front window in an apartment on the third floor of the building, and that men were passing through the entry into this building; that after observing these two men, Barker, the officer, placed them under arrest and upon searching them found policy tickets, which are a part of the gambling game, in possession of the defendant Russell; that the officer then proceeded to the rear of the building and walked up the back stairs to the third floor landing, and while there the shades on cover of a window was raised and the officer saw the interior of the room, in which was a policy board, which is used in this gambling game, and policy chips on a table, around which were seated a large number of persons. The police officer made his presence known, and commanded that the door be opened, but same was not done. He then raised with the aid of a man named Silver an adjacent window opening into this room and entered the premises. There were in all 25 men and women in this 4-room apartment, and many were taken into custody by the police officer. Upon a search of the 25 men and women after their arrest, policy tickets and considerable sums of money and silver coin were found on some of the defendants. The closet door was opened and a

The violation charged is a violation of a city ordinance. The violation of this ordinance was seen by the officer, and under the facts the defendant was lawfully arrested, but it is suggested that the officer invaded the sanctity of a home, and thereby violated the Federal and Illinois Constitutions, which protect a home and the person from any unlawful search and seizure unless a proper warrant is issued for that purpose. No one appeared at the time of the arrest of the defendant claiming to be the owner of the so-called four room apartment; nor did any one at that time protest against what is contended to be an unlawful invasion of the premises. It is but pretence to claim that this place was a home. The presence of 26 men and women in this four room flat would indicate that the rooms were being used as a place for public gambling. While the rights of citizenship should be protected against an unlawful invasion of the home of a citizen, and unreasonable search and seizure, still in the instant case a City of Chicago ordinance was violated in the presence of this officer who testified as we have already indicated in this opinion, and by reason of this violation in his presence or view he was authorized to act and place the offender under arrest.

It appears that the defendant was on the premises in which the events already described took place. The facts were before the court, and we are not prepared to say that they were insufficient to justify the court's finding the defendant guilty. The defendant did not attempt to show how he came to be in the premises, or explain the possession of the policy slips, or how they were obtained.

The point made by the defendant is, that the complaint charging a violation of the ordinance is substantially defective

The witness charged in a report of a city ordinance
the violation of this ordinance was seen by the witness, and under
the facts the defense is not lawfully presented, but it is suggested
that the witness intended the meaning of a man, and thereby violated
the Federal and Illinois laws, which require a man and
the person from any unlawful action and require unless a proper
warning is issued for that purpose. He was reported at the time
of the arrest of the defendant claiming to be the owner of the 20-
caliber law room apartment; now did any one at that time arrest
against what is contended to be an unlawful invasion of the premises
it is not proposed to claim that this place was a home. The
presence of 20 men and women in this room from 1917 would indi-
cate that the room was being used for a house for parties invited.
While the right of citizenship should be protected against an
unlawful invasion of the home of a citizen, and reasonable search
and seizure, still in the instant case a list of Chicago ordinance
was violated in the presence of this witness who testified he was
have already indicated in this action, and by reason of this
violation in his presence or vice he was authorized to act and
place the defendant under arrest.
It appears that the defendant was on the premises in
which the search was conducted. The witness
before the court, and he was not prepared to say that they were
lawful in so justify the court's finding the defendant guilty.
The defendant did not attempt to show how he came to be in the
premises, or explain the possession of the policy alone, or how
they were obtained.
The point made by the defendant is, that the complaint
charging a violation of the ordinance is substantially defective

in that it mentions several things disjunctively, there being but one violation which may be committed in different ways.

It appears from the record that upon motion of the defendant, it was ordered that trial by jury be waived, and that the case be submitted to the court for trial; that after the trial the defendant made a motion to quash the complaint, but did not specify any grounds for the motion. This motion comes too late; it should have been made at the first opportunity, and by proceeding to trial was waived. After the Court found the defendant guilty, the defendant moved in arrest of judgment, and the question therefore arises, is the complaint in the instant case substantially defective? This Court in the case of People v. Cullen, 336 Ill. App. 636, in passing upon the question involved in that case, reversed a judgment entered in a criminal proceeding on the ground that the information charged the defendant disjunctively, there being but one offense which could be committed in different ways; that the conjunctive "and" must ordinarily in the indictment take the place of "or" in a statute. This case, however, does not apply in the instant case. This being a civil action, the questioned words "custody or control" are practically synonymous, as has been well expressed by counsel for the City as follows: "Whatever is in a persons custody is legally in his control."

Strict application should not apply in the instant case, especially when the complaint is sufficient to advise the defendant of the nature of the violation charged. The complaint charges that in having in his, the defendant's possession "certain policy papers, prints, writings, numbers, devices, policy sheets or articles of such kind as are commonly used in carrying on, promoting, or playing the game commonly called lottery or polley", defendant is chargeable with the offense of having gambling devices in his possession.

in that it mentions several things. Effectively, there being but
one violation which may be committed in different ways.
It appears from the record that upon motion of the
defendant, it was ordered that trial by jury be waived, and that
the case be proceeded to the court for trial; that after the trial
the defendant made a motion to quash the complaint, but did not
specify any grounds for the motion. This motion comes too late;
it should have been made at the time opportunity, and by proceeding
to trial was waived. After the court found the defendant guilty,
the defendant moved in arrest of judgment, and the question therefore
arose, as to the validity of the verdict and judgment. In this
case, in the case of Harris v. Harris, 220 Ill. App. 2d, 195, in
quashing upon the question involved in that case, reversed a judgment
entered in a criminal proceeding on the ground that the information
charged the defendant respectively, there being but one offense
which could be committed in different ways; that the complaint
"and" must exist in the indictment when the crime of "or" is
a statute. This case, however, does not apply in the instant case.
This being a civil action, the question was "whether or not"
one specifically enumerated, as has been well expressed by counsel
for the City as follows: "Whether is it a person's conduct is
legally in his control."
Great application should not apply in the instant case,
especially when the complaint is sufficient to state the offense
of the nature of the violation charged. The complaint charges that
in having in his, the defendant's possession "certain policy papers,
plans, drawings, notes, figures, tables, charts or sketches of
such kind as are commonly used in carrying on, practicing, or playing
the game commonly called lottery or policy," defendant is chargeable

we, therefore, conclude that this complaint is not subject to the rule contended for by the defendant.

There is but one further question of the defendant to be considered, and that is that Sections 4183 and 4184 of the ordinance contained in the Revised Code of the City of Chicago are void as being in conflict with Section 3 of "An Act For the Prevention of Policy Playing, Approved April 29, 1908", in that Section 4183 provides for a minimum fine of \$25, and a maximum of \$200. The State law containing the same prohibition provides for a minimum fine of not less than \$500 or more than \$1,000, or imprisonment in the county jail for more than one year or both. The question raised as to the invalidity of the ordinance is that the Legislature having provided the minimum punishment for the possession of policy slips, the city cannot provide a smaller or a greater punishment.

The Appellate Court in the case of City of Spring Valley v. Spring Valley Coal Co., 71 Ill. App. 432, passed upon a question similar to the one before us, and we quote from this case without further comment. The court said:

"The ordinance is a mere police regulation of the city which it had full power under the general law to adopt. It is general in its nature, operating alike upon all classes of persons within the city using weights and measures or dealing in food. An action for its violation is nothing more than a civil proceeding to collect a penalty. The statute is special, applying only to mine owners or operators and their agents in all parts of the State. It is in its nature criminal, and a prosecution under it would be by indictment or information.

Cities have power under the general law to pass ordinances to suppress bawdy and disorderly houses, gaming and gambling houses; to license, regulate and prohibit the sale of intoxicating liquor; to prevent intoxication, fighting and all disorderly conduct, and many other police regulations. In matters of this nature, the State and Municipal authorities have concurrent jurisdiction, and in the absence of a prosecution by the city the State may interfere. It has never been held, so far as we are aware, that the granting of these powers to municipal authorities withdrew original jurisdiction upon these subjects from the State. The contrary doctrine was held in Reibold v. The People, 86 Ill. 33.

It is true that in the case at bar, the city ordinance and the statute differ in the maximum and minimum penalties imposed, but we do not think that fact necessarily creates such a conflict between the two that they can not stand together."

Having considered what we regard as the important questions raised by the defendant, we do not find that there is such error in the record as would justify this court in reversing and remanding the cause for a new trial. Accordingly, the judgment is affirmed.

OPINION OF THE COURT, 1912

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

THE COURT OF APPEALS, in the case of City of Chicago v. Board of Directors, 101 Ill. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

THE COURT OF APPEALS, in the case of City of Chicago v. Board of Directors, 101 Ill. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

1888

CITY OF CHICAGO,

County,

v.

EDWARD J. COUGHLIN,

Respondent.

STATE OF ILLINOIS,
County,
v.
EDWARD J. COUGHLIN.

2641 A. 398

Opinion filed June 12, 1933

IN RE EDWARD J. COUGHLIN, PETITIONER FOR WRIT OF HABEAS CORPUS.

ON PETITION.

This case has been consolidated with the case of

CITY OF CHICAGO v. EDWARD J. COUGHLIN, No. 2888, in which

an opinion has been filed today. The facts are substantially

in both cases and very similar, and the same principles are

therefore applicable in the instant case.

For the reasons stated in case Number 2888, the

judgment of the Municipal Court is affirmed.

THOMAS J. BRIDGES,

CLERK OF THE SUPREME COURT.

35957

CITY OF CHICAGO,

Appellee,

v.

TIMOTHY PURCELL,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 598⁴

Opinion filed June 15, 1932

MR. PRESIDING JUSTICE REBEL DELIVERED THE OPINION
OF THE COURT.

This case has been consolidated with the case of
City of Chicago v. Emanuel Russell, No. 35955, in which
an opinion has been filed today. The facts and circumstances
in both cases are very similar, and the views expressed in that
case are applicable in the instant case.

For the reasons stated in case Number 35955, the
judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

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Opinion filed June 15, 1938

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35958

CITY OF CHICAGO,

Appellee,

v.

ESTHER TAYLOR,

Appellant.

APPEAL FROM

MUNICIPAL COURT OF

CHICAGO.

267 I.A. 598

Opinion filed June 15, 1932

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION
OF THE COURT.

This case has been consolidated with the case of
City of Chicago v. Emanuel Russell, No. 35955, in which
an opinion has been filed today. The facts and circumstances
in both cases are very similar, and the views expressed in
that case are applicable to the instant case.

For the reasons stated in case Number 35955, the
judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.



267 I.A. 398

Opinion filed June 1, 1932

OF THE COURT.

This case has been considered with the case of City of Chicago v. Edward J. Sullivan, No. 2582, in which as appears from the briefs, the facts and circumstances are very similar, and the issue presented in that case is applicable to the instant case.

Let the record stand as now before the Court, and the judgment of the majority be affirmed.

JUSTICE DELANEY.

THIRD AND FOURTH, 11. 1932.

35959

CITY OF CHICAGO,

Appellee,

v.

ALBERT TAYLOR,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 598

Opinion filed June 15, 1932

MR. PRESIDING JUSTICE NEBEL delivered the

opinion of the court.

This case has been consolidated with the case of City of Chicago v. Emanuel Russell, No. 35958, in which an opinion has been filed today. The facts and circumstances in both cases are very similar, and the views expressed in that case are applicable to the instant case.

For the reasons stated in case Number 35958, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

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35960

CITY OF CHICAGO,

Appellee,

v.

HATTIE WILKINS,

Appellant.

Opinion filed June 15, 1932

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 598⁷

MR. PRESIDING JUSTICE MR. EL DELIVERED THE OPINION
OF THE COURT.

This case has been consolidated with the case of
City of Chicago v. Emanuel Russell, No. 35955, in which
an opinion has been filed today. The facts and circumstances
in both cases are very similar, and the views expressed in
that case are applicable to the instant case.

For the reasons stated in case Number 35955, the
judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.



Opinion filed June 15, 1938

APPEAL FROM

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U. S. COURT

885 A.I. 388

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OF THE COURT

This case has been consolidated with the case of

City of Chicago v. Emanuel Russell, et al., No. 8858, in which

an opinion was filed today. The facts and circumstances

in both cases are very similar, and the view expressed in

that case are applicable to the instant case.

For the reasons stated in case number 8858, the

judgment at the trial court is affirmed.

THOMAS J. MURPHY

RECEIVED AT THE COURT, U. S. COURT

35961

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

v.

JESSE GROSS,

Appellant,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 898

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION
OF THE COURT.

This case has been consolidated with the case of
City of Chicago v. Emanuel Russell, No. 35955, in which
an opinion has been filed today. The facts and circumstances
in both cases are very similar, and the views expressed in
that case are applicable to the instant case.

For the reasons stated in case Number 35955, the
judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

FRIED AND WILSON, JJ. CONCUR.

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Opinion filed June 15, 1938

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OF THE COURT

This case has been consolidated with the case of

City of Chicago v. Edward J. Gurnea, No. 1000, in which

an opinion has been filed today. The facts and circumstances

in both cases are very similar, and the views expressed in

this case are applicable to the instant case.

For the reasons stated it is hereby ordered, that

judgment in the instant case be affirmed.

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35962

CITY OF CHICAGO,

Appellee,

v.

GENE NOBLE,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

267 I.A. 598⁹

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION
OF THE COURT.

This case has been consolidated with the case of
City of Chicago v. Emanuel Russell, No. 35955, in which an
opinion has been filed today. The facts and circumstances
in both cases are very similar, and the views expressed in
that case are applicable to the instant case.

For the reasons stated in case Number 35955, the
judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

FRIED AND WILSON, JJ. CONCUR.

STATE OF NEW YORK
IN SENATE
JANUARY 1, 1938

REPORT OF THE
COMMISSIONER OF
THE STATE DEPARTMENT
OF AGRICULTURE
AND FORESTRY
FOR THE YEAR
1937

1937

THE STATE OF NEW YORK

IN SENATE

THIS CASE HAS BEEN CONSIDERED

THE STATE OF NEW YORK
IN SENATE
JANUARY 1, 1938
THE CASE HAS BEEN CONSIDERED
IN SENATE
JANUARY 1, 1938
THE CASE HAS BEEN CONSIDERED
IN SENATE
JANUARY 1, 1938

FOR THE YEAR 1937

REPORT OF THE COMMISSIONER

OF AGRICULTURE

AND FORESTRY

35963

CITY OF CHICAGO,

Appellee,

v.

MADISON YOUNG,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 598¹⁰

MR. PRESIDING JUSTICE HABEL DELIVERED THE OPINION
OF THE COURT.

This case has been consolidated with the case of
City of Chicago v. Emanuel Russell, No. 35955, in which an
opinion has been filed today. The facts and circumstances
in both cases are very similar, and the views expressed in
that case are applicable to the instant case.

For the reasons stated in case Number 35955, the
judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

FRIDMAN AND WILSON, JJ. CONCUR.

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By using this file, you acknowledge that you have read and understand the

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opinion was held filed today. The facts and circumstances

in both cases the very similar, and the witness expressed in

that case are not available to the public.

For the reasons stated in our Report I

Demille et al from Washington and to Oregon]

... 1974 ...

THE UNIVERSITY OF CHICAGO

35964.

CITY OF CHICAGO,
Appellee,

vs.

LIMA GRAY,
Appellant.

APPEAL FROM MUNICIPAL COURT

CITY OF CHICAGO

267 L.A. 390¹¹

MR. JUSTICE FRIEND DELIVERED WORDS OF REPROACH TO THE COURT.

This case has been consolidated with No. 35955, City of Chicago vs. Emanuel Russell. The facts and circumstances in both cases are the same, and our opinion and conclusions in this case are governed by the views expressed in case No. 35955.

The judgment of the Municipal Court will be affirmed.

THE UNIVERSITY OF CHICAGO

HUBBEL, F.J. and WILSON, J, CONCUR.

James Lyons

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1. *Journal of the American Medical Association*, 1977; 237: 1000-1001.

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• Commenting on the 11th Annual International AIDS Conference, held

Opinion filed June 15, 1932

35985.

CITY OF CHICAGO,
Appellee, }

vs.

WACK ROSS,
Appellant. }

APPEAL FROM MUNICIPAL COURT

CITY OF CHICAGO

267 I.A. 598¹²

MR. JUSTICE FRISBIE DELIVERED THE OPINION OF THE COURT.

This case has been consolidated with No. 35955, City of Chicago vs. Emanuel Russell. The facts and circumstances in both cases are the same, and our opinion and conclusions in this case are governed by the views expressed in case No. 35955.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

REBEL, F.J. and KILGORE, J. CONCUR.

Opinion filed June 15, 1938

CHIEF JUSTICE

CITY OF CHICAGO

CHIEF JUSTICE

BY

CHIEF JUSTICE

CHIEF JUSTICE

367 I.A. 398

THE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF ILLINOIS, in the case of the City of Chicago, Plaintiff, against the Board of Public Works, Defendant, has rendered the following opinion:

This case has been submitted with No. 367, City of Chicago vs. Board of Public Works. The facts and circumstances in both cases are the same, and the opinion and decision in this case are governed by the facts expressed in case No. 367.

The judgment of the Municipal Court will be affirmed.

CHIEF JUSTICE

CHIEF JUSTICE, CHIEF JUSTICE, CHIEF JUSTICE

Opinion filed June 15, 1932

35966.

CITY OF CHICAGO,
Appellee,

vs.

MARY JONES,
appellant.

APPEAL FROM MUNICIPAL COURT

CITY OF CHICAGO.

267 I.A. 598¹³

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This case has been consolidated with No. 35955, City of Chicago vs. Emanuel Russell. The facts and circumstances in both cases are the same, and our opinion and conclusions in this case are governed by the views expressed in case No. 35955.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

REBEL, F.J. and WILSON, J. CONCUR.

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Opinion filed June 15, 1932

35967.

CITY OF CHICAGO,

Appellee, }

EMUEL FROM MUNICIPAL COURT

vs.

JAMES MONROE,

Appellant. }

CITY OF CHICAGO.

267 I.A. 598¹⁴

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

This case has been consolidated with No. 35955, City of Chicago vs. Emanuel Russell. The facts and circumstances in both cases are the same, and our opinion and conclusions in this case are governed by the views expressed in case No. 35955.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

EMUEL, W.J. and WILSON, J. CONCUR.

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35955.

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

APPEAL FROM MUNICIPAL

vs.

DAN McLAURINE,

Appellant.

CITY OF CHICAGO.

267 I.A. 598¹⁵

MR. JUSTICE FRIEND DELIVERS THE OPINION OF THE COURT.

This case has been consolidated with No. 35955, City of Chicago vs. Emanuel Russell. The facts and circumstances in both cases are the same, and our opinion and conclusions in this case are governed by the views expressed in case No. 35955.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

HARREL, P.J. and WILSON, J., CONCUR.

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35969.

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

vs.

EDWARD DAWSON,

Appellant.

APPEAL FROM MUNICIPAL COURT

CITY OF CHICAGO.

267 I.A. 598¹⁶

MR. JUSTICE FRIED DELIVERED THE OPINION OF THE COURT.

This case has been consolidated with No. 35955, City of Chicago vs. Emanuel Russell. The facts and circumstances in both cases are the same, and our opinion and conclusions in this case are governed by the views expressed in case No. 35955.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

HEBEL, F.J. and WILSON, J, CONCUR.

898-899

• *World Journal*

1. The first group of people who are interested in the study of the history of the world are the historians. They are people who study the past and try to understand what happened and why it happened. They use many different sources of information, such as books, documents, and artifacts, to reconstruct the past. They also try to understand the people who lived in the past and how they thought and felt. Historians are interested in the history of the world because they want to know how we got to where we are today and what we can learn from the past.

805 A172S

1. The first of these is the fact that the Government has not yet decided whether or not it will accept the offer of the United States to purchase the surplus stocks of the Government. This decision is of great importance to the Government, as it will determine whether or not the Government will be able to dispose of its surplus stocks in a timely and profitable manner.

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

35970.

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

vs.

EMMUEL RUSSELL,

Appellant.

APPEAL FROM MUNICIPAL COURT

CITY OF CHICAGO.

267 I.A. 598¹⁷

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This case has been consolidated with No. 35955, City of Chicago vs. Emmuel Russell. The facts and circumstances in both cases are the same, and our opinion and conclusions in this case are governed by the views expressed in case No. 35955.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. and WILSON, J, CONCUR.

Opinion filed June 18, 1988

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

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UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT has affirmed the judgment of the District Court for the Western District of Texas, which granted summary judgment in favor of the defendant. The court of appeals found that the plaintiff failed to establish a prima facie case of discrimination under the Texas Fair Employment Practices Act. The court of appeals also found that the plaintiff failed to establish that the defendant's actions were motivated by race. The court of appeals affirmed the judgment of the District Court.

UNITED STATES DISTRICT COURT

35971

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

vs.

CHARLES ROSS,

Appellant.

APPEAL FROM MUNICIPAL COURT

CITY OF CHICAGO.

267 L.A. 598

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This case has been consolidated with No. 35983, City of Chicago vs. Emanuel Russell. The facts and circumstances in both cases are the same, and our opinion and conclusions in this case are governed by the views expressed in case No. 35983.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

KNEEL, P.J. and WILSON, J, CONCUR.



Original filed Jan 12, 1913

Page

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Set A. 1. 398

THE FOLLOWING IS A SUMMARY OF THE FACTS AND CIRCUMSTANCES OF THE CASE, AS SET FORTH IN THE PETITION AND ANSWER, AND AS APPEARED TO THE COURT AT THE HEARING THEREON. THE PETITIONER, A. J. BROWN, OF THE COUNTY OF ALABAMA, AND THE RESPONDENT, J. M. SMITH, OF THE COUNTY OF ALABAMA, HAVE BEEN PARTIES TO THE SUIT SINCE THE PETITION WAS FILED IN THE COURT OF THE COUNTY OF ALABAMA, AND THE RESPONDENT HAS BEEN SERVED WITH A COPY OF THE PETITION AND ANSWER, AND HAS BEEN GIVEN AN OPPORTUNITY TO BE HEARD BY THE COURT. THE COURT HAS CONSIDERED THE MATTER, AND HAS REACHED THE FOLLOWING DECISION: THE PETITIONER'S PETITION IS GRANTED, AND THE RESPONDENT'S ANSWER IS DENIED. THE COURT HAS ORDERED THAT THE RESPONDENT SHALL PAY TO THE PETITIONER THE SUM OF FIFTY DOLLARS, WITH INTEREST THEREON AT THE RATE OF FIVE PER CENT PER ANNUM, FROM THE DATE OF THE PETITION TO THE DATE OF PAYMENT. THE COURT HAS ALSO ORDERED THAT THE RESPONDENT SHALL PAY TO THE PETITIONER THE COSTS OF THE SUIT, AS ASSESSED BY THE COURT. THE COURT HAS ORDERED THAT THE RESPONDENT SHALL PAY TO THE PETITIONER THE SUM OF FIFTY DOLLARS, WITH INTEREST THEREON AT THE RATE OF FIVE PER CENT PER ANNUM, FROM THE DATE OF THE PETITION TO THE DATE OF PAYMENT. THE COURT HAS ALSO ORDERED THAT THE RESPONDENT SHALL PAY TO THE PETITIONER THE COSTS OF THE SUIT, AS ASSESSED BY THE COURT.

IN WITNESS WHEREOF, I HAVE HEREUNTO SIGNED MY HAND AND SEAL OF OFFICE, AT THE CITY OF ALABAMA, THIS 12TH DAY OF JANUARY, 1913.

CLERK OF THE COURT, J. M. SMITH, OF THE COUNTY OF ALABAMA.

35972.

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

vs.

EDWIN PARKINS,

Appellant.

APPEAL FROM MUNICIPAL COURT.

CITY OF CHICAGO.

267 I.A. 398¹²

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

This case has been consolidated with No. 35955, City of Chicago vs. Emanuel Russell. The facts and circumstances in both cases are the same, and our opinion and conclusions in this case are governed by the views expressed in case No. 35955.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. and WILSON, J. CONCUR.

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805 L.A. 208

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35973

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

v.

T. E. GRAY,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 598⁷⁰

MR. JUSTICE WILSON delivered the opinion of the court.

This case has been consolidated with the case of City of Chicago v. Emanuel Russell, No. 35955, in which an opinion has been filed today. The facts and circumstances in both cases are very similar and the views expressed in that case are applicable to the instant case.

For the reasons stated in case No. 35955, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

1933

Opinion filed June 15, 1933

CITY OF CHICAGO,

Appellee,

vs.

UNITED STATES

OF DISTRICT

7.

T. E. GRAY,

Appellant.

368 144-208

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This case has been consolidated with the case of

City of Chicago v. Samuel Hunsley, et al., in which

an opinion has been filed today. The facts and circumstances

in both cases are very similar and the views expressed in that

case are applicable to the instant case.

For the reasons stated in case No. 32825, the judgment

of the Municipal Court is affirmed.

MR. JUSTICE BRANDEIS.

RECORDED, 7.1. 1933. INDEXED, 7.1. 1933.

35974

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

v.

HELEN JOHNSON,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 598¹

MR. JUSTICE WILSON delivered the opinion of the court.

This case has been consolidated with the case of City of Chicago v. Emanuel Russell, No. 35955, in which an opinion has been filed today. The facts and circumstances in both cases are very similar and the views expressed in that case are applicable to the instant case.

For the reasons stated in case No. 35955, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

Opinion filed June 18, 1938

38074

88-1-A-398

CITY OF CHICAGO,

Respondent,

VERSUS

v.

JOHN J. BURKE,

Petitioner.

MR. JUSTICE BRIDGES delivered the opinion of the court.

This case has been consolidated with the case of

CITY OF CHICAGO v. JOHN J. BURKE, No. 88-1-A-398, in which an

opinion has been filed later. The facts and circumstances

in both cases are very similar and the views expressed in that

case are applicable to the instant case.

For the reasons stated in case No. 88-1-A-398, the judgment

of the Municipal Court is affirmed.

JOHN J. BRIDGES.

CHIEF JUSTICE OF THE SUPREME COURT.

35975

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

v.

ROME BURCHETT,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

267 I.A. 598²⁶⁷

MR. JUSTICE WILSON delivered the opinion of the court.

This case has been consolidated with the case of City of Chicago v. Emanuel Russell, No. 35955, in which an opinion has been filed today. The facts and circumstances in both cases are very similar and the views expressed in that case are applicable to the instant case.

For the reasons stated in case No. 35955, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

OFFICE OF THE ATTORNEY GENERAL

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THE ATTORNEY GENERAL delivered the opinion of the court.
This case has been consolidated with the case of
State of Missouri v. Lemuel Smith, No. 10000, as being an
original case from this court. The facts and circumstances
in both cases are very similar and the same questions are
presented for consideration in the instant case.
For the reasons stated in case No. 10000, the judgment
of the Municipal Court is affirmed.
JUDGMENT AFFIRMED.

WILLIAM F. WILSON, J. CLERK.

35976

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

v.

EDWARD WALKER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 398²³

MR. JUSTICE WILSON delivered the opinion of the court.

This case has been consolidated with the case of City of Chicago v. Emanuel Russell, No. 35955, in which an opinion has been filed today. The facts and circumstances in both cases are very similar and the views expressed in that case are applicable to the instant case.

For the reasons stated in case No. 35955, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

STATE

CITY OF CHICAGO

Defendant

v.

EDWARD BLAKE

Plaintiff

Opinion filed June 10, 1938

APPEAL FROM

MUNICIPAL COURT

NO. 10385

288 I.A. 298

NO. 10385 BLAKE delivered the opinion of the court.
This case has been consolidated with the case of
City of Chicago v. Edward Blum, No. 10386, in which an
opinion has been filed today. The facts and circumstances
in both cases are very similar and the views expressed in that
case are applicable to the instant case.
For the reasons stated in case No. 10386, the judgment
of the Municipal Court is affirmed.
EDWARD BLAKE

ROBERT H. L. AND WILSON, J. CONCUR.

35277

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

v.

HURLEY SEBASTIAN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 399'

MR. JUSTICE WILSON delivered the opinion of the court.

This case has been consolidated with the case of City of Chicago v. Emanuel Russell, No. 35285, in which an opinion has been filed today. The facts and circumstances in both cases are very similar and the views expressed in that case are applicable to the instant case.

For the reasons stated in case No. 35285, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

NEBEL, P.J. AND FRIEND, J. CONCUR.

2027

Opinion filed June 12, 1932

ALBERT WALKER

WOODWARD CLARK

OF CHICAGO, ILL.

CHIEF JUSTICE
JUSTICE
JUSTICE
JUSTICE
JUSTICE

28714.399

MR. JUSTICE WALKER delivered the opinion of the court.

This case has been consolidated with the case of
City of Chicago v. Emanuel Emanuel, No. 35802, in which an
opinion has been filed today. The facts and circumstances
in both cases are very similar and the views expressed in that
case are applicable to the instant case.
For the reasons stated in case No. 35802, the judgment
of the municipal court is affirmed.
Affirmed.

WALKER, J. and PARKER, J. CONCUR.

35978

CITY OF CHICAGO,

Appellee,

v.

JOHN MONROE,

Appellant.

) Opinion filed June 15, 1932

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 399^c

MR. JUSTICE WILSON delivered the opinion of the court.

This case has been consolidated with the case of City of Chicago v. Emanuel Russell, No. 35955, in which an opinion has been filed today. The facts and circumstances in both cases are very similar and the views expressed in that case are applicable to the instant case.

For the reasons stated in case No. 35955, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, F.J. AND FRIED, J. CONCUR.

CITY OF NEW YORK

IN SENATE

JANUARY 10, 1900

REPORT

OF THE

COMMISSIONERS

OF THE

LAND OFFICE

1900

THE COMMISSIONERS OF THE LAND OFFICE

TO THE SENATE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

APRIL 10, 1899, AND A RESOLUTION PASSED BY THE SENATE

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APRIL 10, 1899, AND A RESOLUTION PASSED BY THE SENATE

NEW YORK

1900

35979

CITY OF CHICAGO,

Appellee,

v.

WILLIAM BYRD,

Appellant.

Opinion filed June 15, 1932

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 599³

MR. JUSTICE WILSON delivered the opinion of the court.

This case has been consolidated with the case of City of Chicago v. Emanuel Russell, No. 35955, in which an opinion has been filed today. The facts and circumstances in both cases are very similar and the views expressed in that case are applicable to the instant case.

For the reasons stated in case No. 35955, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

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MR. JUSTICE CLARKE delivered the opinion of the court.

This case has been remanded with the case of

WILLIAM OF GLOUCESTER v. HENRY, EARL OF HUNTINGHAM, No. 1117, to which we

opinion has been filed heretofore. The facts and circumstances

in both cases are very similar and the views expressed in that

case are applicable to the instant case.

For the reasons stated in case No. 1117, the judgment

of the Supreme Court is affirmed.

JOHN M. CLARKE

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35980

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

v.

CHARLES PHOENIX,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 599¹

MR. JUSTICE WILSON delivered the opinion of the court.

This case has been consolidated with the case of City of Chicago v. Emanuel Russell, No. 35955, in which an opinion has been filed today. The facts and circumstances in both cases are very similar and the view expressed in that case are applicable to the instant case.

For the reasons stated in case No. 35955, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

NEBEL, F.J. AND FRIEND, J. CONCUR.

UNITED STATES
DISTRICT COURT
OF DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA
vs.
JOHN EDGAR HOOVER
Defendant.

267 U.S. 302

MR. JUSTICE SUTHERLAND delivered the opinion of the court.

This case has been consolidated with the case of

City of Chicago v. Industrial Union, No. 20082, in which an

opinion has been filed today. The facts and circumstances

in both cases are very similar and the view expressed in that

case are applicable to the instant case.

For the reasons stated in both the Chicago, the judgment

of the National Court is affirmed.

MR. JUSTICE SUTHERLAND.

RECORDED, 7-1, AND INDEXED, 7-1, 1938.

Opinion filed June 15, 1932

35981

CITY OF CHICAGO,

Appellee,

v.

WILLIAM WATKINS,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 L.A. 599⁵

MR. JUSTICE WILSON delivered the opinion of the court.

This case has been consolidated with the case of City of Chicago v. Emanuel Russell, No. 35985, in which an opinion has been filed today. The facts and circumstances in both cases are very similar and the views expressed in that case are applicable to the instant case.

For the reasons stated in case No. 35985, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEEL, F.J. AND FRIEND, J. CONCUR.

Opinion filed June 12, 1933

1933

WYATT KYLE

MINNESOTA COUNTY

ON PETITION

Indigent

v.

WILLIAM WYKING

Respondent

See L.A. 399

MR. WYKING - Petitioner desires the return of the writ.

This case has been remanded after the case of

City of Chicago v. Edward Dowd, 27, 308, is still

on appeal. The facts and circumstances

in both cases are very similar and the views expressed in that

case are applicable to the instant case.

For the reasons stated in case no. 3392, the judgment

of the Municipal Court is affirmed.

WYATT KYLE

RECORDED, P. 1. AND INDEXED, P. 1. 1933.

35982

Opinion filed June 15, 1932

CITY OF CHICAGO,

Appellee,

v.

WILFRED STEWART,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 T. A. 599⁶

MR. PRESIDING JUSTICE NEBEL delivered the opinion of the court.

This case has been consolidated with the case of City of Chicago v. Emanuel Russell, No. 35955, in which an opinion has been filed today. The facts and circumstances in both cases are very similar, and the views expressed in that case are applicable to the instant case.

For the reasons stated in case Number 35955, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

Opinion filed June 12, 1933

3088

MR. JUSTICE

CITY OF CHICAGO

CHIEF OF POLICE

1

CHIEF OF POLICE

CHIEF OF POLICE

9673 A. 1729

MR. JUSTICE DELIVERED THE OPINION

OF THE COURT.

THIS CASE WAS ORIGINALLY FILED WITH ME AT

CITY OF CHICAGO, ILLINOIS, ON JUNE 12, 1933, IN WHICH

OPINION WAS FILED TODAY. THE ISSUE AND CIRCUMSTANCES

IN THIS CASE ARE VERY SIMILAR, AND THE ISSUE PRESENTED IN

THIS CASE ARE APPLICABLE TO THE INSTANT CASE.

FOR THE REASONS STATED IN MR. JUSTICE DELIVERED, THE

JUDGMENT OF THE CHIEF OF POLICE IS AFFIRMED.

JUDGMENT AFFIRMED.

CHIEF OF POLICE, CITY OF CHICAGO.

35088

ANNA M. MAREMONT,
(Plaintiff) Appellee,
v.
COSMOPOLITAN LIFE INSURANCE
COMPANY, a corporation,
(Defendant) Appellant.

9
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

267 I.A. 599

Opinion filed June 15, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued in assumpsit in the Circuit Court of Cook County to recover upon two policies of life insurance issued by the defendant on the life of plaintiff's intestate. The cause was tried by the court without a jury, resulting in a finding and judgment in the sum of \$2,342 and costs.

When this cause came up for oral argument, counsel for the respective parties requested the court to withhold its decision, awaiting the determination of the petition for certiorari in Bethke v. Cosmopolitan Life Insurance Co., reported in 262 Ill. App. 586, and stated to this court that the questions and issues involved in this proceeding were precisely the same as those in the Bethke case. The Supreme Court of Illinois subsequently denied certiorari in the Bethke case.

Various questions are raised, but the principal contention made by plaintiff is that the agreement between the defendant and the American Company was a contract of re-insurance, which indemnified the American Company against the risk it had already assumed, and that it created no privity of contract between the defendant and the insured. This court, in the Bethke case,

JOHN W. HENNING, (Plaintiff) Appellee,
 v.
 HENNINGSON LIFE INSURANCE CO., (Defendant) Appellant.

JAMES L. HENNING, (Plaintiff) Appellee,
 v.
 HENNINGSON LIFE INSURANCE CO., (Defendant) Appellant.

267 I.A. 599

Opinion filed June 15, 1932

THE COURT THEREUPON AFFIRMED THE DECISION OF THE COURT.

Plaintiff sued in assumpsit in the Circuit Court of Cook County to recover upon two policies of life insurance issued by the defendant on the life of plaintiff's late wife. The same were taken by the court without a jury, resulting in a finding and judgment in the sum of \$2,942 and costs.

When this cause came up for oral argument, counsel for the respective parties requested the court to withhold its decision, awaiting the determination of the petition for certiorari in Winters v. Henningson Life Insurance Co., reported in 266 Ill. App. 582, and stated to this court that the questions and issues involved in this proceeding were precisely the same as those in the Winters case. The Supreme Court of Illinois subsequently denied certiorari in the Winters case.

Various questions are raised, but the principal contention made by plaintiff is that the agreement between the defendant and the Henningson Company was a contract of re-insurance, which indemnified the Henningson Company against the risk it had already assumed, and that it created no privity of contract between the defendant and the insured. This court, in the Winters case,

decided the foregoing contention adversely to the defendant for the reasons stated in the opinion, and we concur in the conclusion there reached.

Various other contentions are here made which are similar to those advanced in the Bethke case, and likewise determined adversely to the defendant herein. We consider it unnecessary to dwell at length upon these contentions because the same are fully covered by the court's opinion in Bethke v. Cosmopolitan Life Insurance Co. supra., and for the reasons there stated the judgment of the Circuit Court in this proceeding will be affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND WILSON, CONCUR.

decided the foregoing contention adversely to the defendant for
the reasons stated in the opinion, and we concur in the conclusion
there reached.

Various other contentions are here made which are
similar to those advanced in the former case, and likewise refer-
enced adversely to the defendant herein. We consider it unnecessary
to dwell at length upon these contentions because the same are
fully covered by the court's opinion in *Wether v. Commonwealth*
like *Lawrence Co. v. ...*, and for the reasons there stated the
judgment of the circuit court in this case will be affirmed.

REVEREND JUSTICE

RENNIE, J. J. AND WILSON, JUDGES.

35252

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

RONALD DOBROVOLSKI,

Plaintiff in Error.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 599⁵

Opinion filed June 15, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The defendant, Ronald Dobrovolski, was on August 7, 1929, convicted in the Municipal Court of Chicago of an assault with a deadly weapon upon the complaining witness, Noble D. Foster, and was sentenced to sixty days in the House of Correction and fined \$25 and costs. Defendant was likewise convicted of violating an ordinance of the City of Chicago in driving an automobile past a street car while it was stopped and fined \$25 and costs. This writ of error is prosecuted to review the judgment entered by the trial court.

It appears from the evidence that on May 19, 1929, at about 2:15 in the morning, defendant was driving his automobile south on Michigan Avenue in Chicago, following one of the cars of the Chicago Surface Lines. The complaining witness, Noble D. Foster, left the said street car at 98th Street, and after alighting therefrom, was struck by defendant's automobile and injured.

Defendant urges two grounds for reversal: (1) that the evidence is insufficient to sustain the judgment of the court; and (2) that the state failed to prove any intent on the part of defendant to commit a crime. With reference to the first contention, the evidence is conflicting. Fred W. Spiering testified for the people that he was a motorman for the Chicago Surface Lines, operating a street car at the time of the accident; that he stopped the street car at 98th street at about the proper place and that the complaining witness whose name he did not then know, got off the street car at the front

STATE

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs.

People's Representative,

Settled by

Opinion filed June 15, 1933

THE JUDICIAL COUNCIL OF THE STATE OF ILLINOIS

The defendant, Ronald J. McDevitt, was on August 7,

1932, arrested in the Municipal Court of Chicago on an arrest with

a bench warrant upon the complaint of Mrs. E. J. Taylor, and

was sentenced to sixty days in the House of Correction and fined \$25

and costs. Defendant was likewise convicted of violating an ordinance

of the City of Chicago in driving an automobile past a street car

while it was stopped and fined \$25 and costs. This writ of error is

presented for review the judgment entered by the trial court.

It appears from the evidence that on May 12, 1932, at

about 2:15 in the morning, defendant was driving his automobile south

on Michigan Avenue in Chicago, following one of the cars of the

Chicago Police Bureau. The complaining witness, Mrs. E. J. Taylor,

lived at the time of the offense at 2323 North Broadway, and after alighting there-

from, was struck by defendant's automobile and injured.

Defendant argues two grounds for reversal: (1) that the

evidence is insufficient to sustain the judgment of the court; and

(2) that the state failed to prove any intent on the part of defendant

to commit a crime. With reference to the first contention, the evi-

dence is sufficient. That a witness testified for the people that

he saw a motorist for the Chicago Police Bureau, arrested a street

car at the time of the accident; that he stopped the street car at

2323 North Broadway at about the proper place and that the complaining witness

testified that she did not know, but all the expert car at the front

end while the same was stopped, at the regular stopping place; that said passenger took about three steps after alighting from the car when defendant's automobile struck him; that the witness is familiar with the speed of automobiles, and in his opinion, defendant's car was going 30 to 40 miles an hour; that after the accident occurred, Spiering left the street car and ran after the automobile which continued in motion for approximately 50 to 75 feet before it stopped; that he and another man then placed Foster, the complaining witness, in another automobile which conveyed him to a hospital.

Patrick J. O'Connor testified for the people that he was the conductor on the street car upon which Foster was a passenger immediately prior to the accident; that a man on the back platform of the said street car told him someone had been hit by an automobile, and that he, O'Connor, helped pick up the complaining witness, who seemed to be severely injured. O'Connor further testified that at the time of the accident the street car was north of the north walk of 98th Street standing still, and that after Foster was struck by defendant's automobile, the street car did not again start in motion.

Gad Noble testified for the people that he was a patrolman at the time of the accident, and witnessed the injury to the complaining witness, Noble D. Foster; that he was sitting on the front seat of the street car next to the motorman when the complaining witness came to the front of the street car and called for a stop at 98th Street; that the motorman stopped the street car, opened the door and allowed the passenger to step off the car, immediately following which an automobile proceeding about 35 miles an hour struck the complaining witness and dragged him about 30 feet before coming to a stop.

One Ray Benjamin testified for the people that he was riding on the front end of the street car right behind the motorman when Noble D. Foster asked to get off at 98th Street; that the car stopped at 98th Street, the motorman opened the door, Foster stepped

and while the same was stopped, at the regular stopping place; that said passenger took about three steps after alighting from the car when defendant's automobile struck him; that the witness is familiar with the speed of automobiles, and in his opinion, defendant's car was going 30 to 40 miles an hour; that after the accident occurred, defendant left the street car and ran after the automobile which continued in motion for approximately 25 to 35 feet before it stopped; that he and another man then placed Foster, the complaining witness, in another automobile which conveyed him to a hospital.

Witness E. J. O'Connor testified for the people that he was the conductor on the street car upon which Foster was a passenger immediately prior to the accident; that a man on the back platform of the said street car told him someone had been hit by an automobile, and that he, O'Connor, helped pick up the complaining witness, who seemed to be seriously injured. O'Connor further testified that at the time of the accident the street car was south of the north side of 25th Street standing still, and that after Foster was struck by defendant's automobile, the street car did not again start in motion.

And John testified for the people that he was a passenger at the time of the accident, and witnessed the injury to the complaining witness, Noble M. Foster; that he was sitting on the front seat of the street car next to the motorman when the complaining witness came to the front of the street car and called for a stop and asked the motorman to stop the car, immediately following which an automobile proceeding about 35 miles an hour struck the complaining witness and dragged him about 50 feet before coming to a stop.

And Mrs. [Name] testified for the people that she was sitting on the front seat of the street car next to the motorman when Noble M. Foster asked to get off at 25th Street; that the car

down from the car, and just then an automobile "whizzed by" and he saw Foster fall and the automobile continued in motion about a half a block before it came to a stop.

The complaining witness testified that he requested the motorman to stop at 92th Street; that the car came to a full stop on the north side of the street; that he then stepped down from the car and had taken about two steps when something hit him, and that was the last he remembered until he awoke in the hospital.

Murton Wescott testified for the defendant that he witnessed the accident at 92th Street and Michigan Avenue; that he noticed the street car slowing down for a stop, but could not determine whether the car had actually stopped or not because his automobile was coming up in the rear of defendant's; that he saw the complaining witness alight from the street car and take 2 or 3 steps, but that defendant's car then blotted out his view, and he next observed the body rolling under the car which was going 25 to 30 miles an hour.

Defendant, in his own behalf, stated he had been employed by the Pullman Company for some 19 years and was driving his automobile south on Michigan Avenue at the time of the accident. He stated that the street car slowed down but did not come to a stop on the north side of the intersection but stopped on the south side, and that when the complaining witness, Foster, stepped from the street car it was still in motion. Defendant further testified that when the street car slowed down on the north side of the intersection, he slowed his automobile down also, but when the street car failed to stop, he shifted to second gear and started on again, proceeding, as he testified, at a rate of 10 to 15 miles an hour in second gear when Foster jumped right in front of his car.

All of the witnesses for the state testified positively that the street car had come to a full stop at the intersection and that defendant's automobile passed it while standing at an

from the car, and found them on automobile "whipped by" and he saw Foster fall and the automobile continued in motion about a half a block before it came to a stop.

The witness further testified that he

the witness to stop at 12th Street; that the car came to a full stop on the north side of the street; that he then stepped down from the car and had taken about ten steps when he saw the car start and that was the last he remembered until he awoke in the hospital.

Witness further testified for the defendant that he

witnessed the accident at 12th Street and Michigan Avenue; that he noticed the street car slowing down for a stop, but could not determine whether the car had actually stopped or not because his eyes were coming up in the rear of defendant's; that he saw the car plainly witness right from the street car and saw it stop, but that defendant's car then passed and his view, and he next observed the body rolling under the car which was going at 30 miles an hour.

Witness, in his own words, stated he had seen

witnessed by the Police Officer for some 15 feet and the driver of automobile seen on Michigan Avenue at the time of the accident. He stated that the street car slowed down but did not come to a stop on the north side of the intersection but passed on the west side.

and that when the eyewitness witness, Foster, stepped from the street car it was still in motion. Witness further testified that when the street car slowed down on the north side of the intersection, he allowed the automobile down when, but when the street car failed to stop, he shifted to second gear and started on again, proceeding, as he testified, at a rate of 10 to 15 miles an hour in second gear when Foster jumped right in front of his car.

All of the witnesses for the state testified positively

if that the street car had come to a full stop at the intersection

and that defendant's automobile would be liable for the accident.

excessive rate of speed. Defendant was the only witness who testified that the street car was still in motion when Foster alighted. Wescott, who also testified on behalf of defendant, was not certain on this point, but did state that defendant passed the street car at a rate of 25 or 30 miles an hour. The trial court who heard the witnesses was in a much better position to determine these questions of fact, and we are not disposed to disturb the court's finding and judgment upon these controverted questions of fact.

The second point urged for reversal is that the injury was entirely accidental, and that defendant had no intention to commit a crime. It was held in People v. Benson, 331 Ill. 605, that the driver of an automobile may be convicted on a charge of assault with a deadly weapon where the evidence shows beyond a reasonable doubt that his conduct was so reckless, wanton and willful as to show utter disregard for the safety of others, notwithstanding the absence of any specific intent to strike or collide with the person injured. Drivers of automobiles should be required to exercise the utmost care and caution in passing street cars from which passengers are being discharged at intersections, and to scrupulously observe the ordinances requiring them to stop while passengers are alighting and entering cars.

To pass a standing car at an excessive rate of speed under the circumstances disclosed by the evidence in this case, indicates wanton and willful disregard for the rights of the traveling public. While it is the duty of the courts to guard the rights of every defendant charged with crime and to give him the full benefit of a reasonable doubt of his guilt when tried for crime, yet it is also the duty of the courts to protect passengers stepping on and off street cars against wanton and willful misconduct of reckless driving. It was so held in the Benson case *supra*, and if in the court's opinion the evidence in this proceeding justified a finding of willful and wanton recklessness on the part of defendant, the finding and judgment of the trial court should be and is accordingly affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, CONCUR.

excessive rate of speed. Defendant was the only witness who testified that the street car was still in motion when he left. Witness, who also testified on behalf of defendant, was not certain on this point, but his statement that defendant passed the street car at a rate of 25 or 30 miles an hour. The trial court also heard the witnesses who in a much better position to determine these questions of fact, and we are not disposed to disturb the court's finding and judgment upon these controverted questions of fact.

The second point argued for reversal is that the injury was entirely accidental, and that defendant had no intention to commit a crime. It was held in People v. ..., 331 Ill. 608, that the driver of an automobile may be convicted on a charge of assault with a deadly weapon when the evidence shows that he intended to kill or to do serious bodily harm to another person. That his conduct was so reckless, wanton and willful as to show a disregard for the safety of others, notwithstanding the absence of any specific intent to commit or attempt to commit the same offense. Of automobiles should be required to exercise the highest care and caution in passing others from which no danger is being directed at investigations, and to continuously observe the conditions existing then to stop while passengers are alighting and entering cars. To pass a standing car at an excessive rate of speed under the circumstances disclosed by the evidence in this case, indicates that defendant was reckless, wanton and willful in disregarding the rights of the traveling public. While it is the duty of the courts to guard the rights of every defendant charged with crime and to give him the full benefit of a reasonable doubt of his guilt when faced the case, yet it is also the duty of the courts to protect passengers stepping on and off street cars against wanton and willful misconduct of reckless driving. It was so held in the common case above, and it is the court's opinion that evidence in this case would justify a finding of willful and wanton recklessness on the part of defendant. The finding and judgment of the trial court should be and is accordingly affirmed.

35351

JOLIET NATIONAL BANK OF JOLIET,
Illinois, Administrator of the
Estate of Fred M. Ashamy, deceased,

Defendant in Error,

v.

R. E. FARMER COMPANY, a corporation,

Plaintiff in Error.

UNIT OF ERROR

TO SUPERIOR COURT

COOK COUNTY.

267 I.A. 599

Opinion filed June 15, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The Joliet National Bank, as Administrator of the estate of Fred M. Ashamy, deceased, recovered judgment for \$10,000 against defendant under the injuries act for the benefit of next of kin.

The declaration consisted of two counts, the first charging general negligence, and the second wilful and wanton conduct. To these counts defendant interposed a plea of the general issue.

It appears from the evidence that Fred M. Ashamy, the deceased, who was 34 years of age and had been married approximately two months prior to his death, left the home of his parents at Coles City, Illinois, some 33 miles from the place of the accident, at about 5:30 o'clock on the morning of December 13, 1927, together with his mother, enroute to Chicago in a Buick automobile, proceeding in a northerly direction on State Highway No. 4.

About 6:30 that morning, a motor tractor drawing a semi-trailer and trailer, belonging to defendant and operated by its driver who was accompanied by a helper, proceeded in a southerly direction upon said highway. Defendant's vehicle had just rounded the curve from the northeast and entered upon the road where it proceeds in a southerly direction and slightly down grade, when a collision ensued with Ashamy's car, as a result of which Ashamy

JOHN EDWARD GALT, JR.,
Defendant in error,
vs.
The People of the State of Illinois,
Plaintiff in error.

Defendant in error,

vs.
The People of the State of Illinois,
Plaintiff in error.

Plaintiff in error.

JOHN EDWARD GALT, JR.,

Defendant in error,

vs.
The People of the State of Illinois,
Plaintiff in error.

Plaintiff in error.

Opinion filed June 15, 1933

MR. JUSTICE BRADY delivered the opinion of the court.
The Joint National Bank, as administrator of the
estate of Fred A. Galt, deceased, recovered judgment for \$10,000
against defendant under the judgment act for the benefit of next
of kin.

The decision consisted of two counts, the first
charging general negligence, and the second willful and wanton con-
duct. To these counts defendant introduced a plea of the general
issue.

It appears from the evidence that Fred A. Galt, the
deceased, who was 45 years of age and had been married approximately
two months prior to his death, left the name of his parents as
John Galt, Illinois, born 25 miles from the river at the mouth of
the Mississippi on the morning of December 11, 1917, together
with his mother, because he himself is a white male, single,
living in a house on State Highway No. 4.

About 8:30 that morning, a motor truck-trailer
semi-trailer and trailer, belonging to defendant and operated by
the driver who was accompanied by a witness, proceeded in a southerly
direction upon said highway. United States Highway No. 4 just beyond
the river from the defendant and entered upon the road about 15
miles in a southerly direction and slightly into curve, when
a collision occurred with Galt's car, as a result of which Galt

and his mother were both thrown from their car to the pavement, Ashamy killed, and his automobile almost completely destroyed.

There is considerable conflict in the evidence as to the manner in which the collision occurred. Mrs. Mary Ashamy, mother of the deceased, testified that their automobile was proceeding northward on the east or right side of the black line which marked the center of the road, at a rate of 20 to 25 miles an hour, when she noticed the motor tractor with two trailers some 75 feet ahead; that the tractor was then about four feet east of the center line and coming "more and more to the east side of the road;" that when it was about 45 feet from the automobile, her son turned his car toward the dirt shoulder on the east side of the pavement and reduced the speed of his car to approximately 15 miles per hour; that the tractor continued to approach the automobile in a southeasterly direction, and while the Buick car was going north, partly on the pavement and partly on the dirt shoulder, the tractor struck the left side of their car, tearing off the whole rear portion thereof.

Ben Klytson testified that he was driving the motor tractor and trailers, loaded with groceries, in a southerly direction on the highway in question; that he saw the lights of a car come in sight as he was making the curve in the road; that the car was traveling about 40 miles an hour on a slippery pavement and swerved from side to side in the path of the tractor, which had edged to the extreme right side of the road, and that the automobile was struck at the rear on the left side; that the impact locked the steering wheel of the tractor so that it could not be controlled, causing it to run into the culvert on the east side of the road; that after the first impact, there was another impact further back where the automobile again hit one of the trailers as it was

and his mother were both thrown from their car to the pavement, and his mother was almost completely destroyed.

There is considerable conflict in the evidence as to

the manner in which the collision occurred. Mrs. Mary Anthony,

mother of the deceased, testified that their automobile was proceeding

northward on the east or right side of the block line which marked

the center of the road, at a rate of 25 to 30 miles an hour, when

she noticed the motor tractor with two travelers some 75 feet ahead;

that the tractor was then about four feet west of the center line

and coming "slow and easy to the east side of the road;" that when

it was about 10 feet from the automobile, her car turned to the

toward the left shoulder on the east side of the pavement and

reduced the speed of his car to approximately 15 miles per hour;

that the tractor continued to approach the automobile in a southeast-

erly direction, and while the truck car was going north, partly on

the pavement and partly on the dirt shoulder, the tractor struck

the left side of their car, sending the whole party flying

backward.

The witness testified that on her driving the motor

tractor and vehicle, headed east or southeast, in a southerly direction

on the highway in question. That on the right side of a car when in

right as he was making the turn in the road; that the car was

traveling about 20 miles an hour on a slightly movement and moved

from side to side in the path of the tractor, which had edged to

the extreme right side of the road, and that the automobile was

struck at the rear on the left side; that the impact looked like

striking wheel of the tractor so that it could not be controlled,

causing it to run into the drivers on the east side of the road;

that after the first impact, there was another impact between

them where the automobile again hit and at the wheel as it was

going by. According to Klytch, the tractor was at no time east of the black line prior to the collision.

Tom Surros testified that he was employed by defendant as helper on the truck at the time of the accident; that he was seated on the right side of the tractor, beside the driver; that they were proceeding slowly on the right side of the road to the west of the black line; that he called the truck driver's attention to the noise of an automobile and told him to be careful; that something was coming. This witness spoke poor English, and his testimony was not entirely clear, but in general, it tends to substantiate the evidence of Klytch, the driver.

Walter Cave, who was employed at the gas station about 400 feet north of where the accident occurred, saw the tractor and trailers pass the station shortly before the collision, moving at the rate of approximately 20 miles per hour. He heard the crash and immediately went to the scene of the accident. He found the tractor about 400 feet south of the gas station, facing northeast with its front end against a concrete culvert, which was some 9 feet east of the easterly edge of the pavement of the highway. The semi-trailer was attached to the tractor and facing southeast. Directly back, or to the north of the semi-trailer, was the trailer. Cave found the left wheels of the semi-trailer 2 or 3 feet east of the center line of the road, and the left rear wheel of the trailer about 1 foot east of this line. Ashamy's body was underneath the left rear wheel of the trailer, his body and legs east of the center line of the road. Glass and debris, including a portion of the roof of the automobile which had been torn from the car, were lying directly east of Ashamy's body. Mrs. Ashamy was lying in the center of the road about 35 feet north of the rear end of the trailer and the automobile was some 15 or 20 feet north of her,

going by. According to Kipich, the tractor was at no time east of the black line prior to the collision.

For sources testified that he was employed by defendant as helper on the truck at the time of the accident; that he was seated on the right side of the tractor, beside the driver; that they were proceeding slowly on the right side of the road to the west of the black line; that he called the truck driver's attention to the noise of an automobile and told him to be careful; that something was coming. This witness spoke poor English, and his testimony was not entirely clear, but in general, it tends to substantiate the evidence of Kipich, the driver.

Witness Nye, who was employed at the gas station about 400 feet north of where the accident occurred, saw the tractor and trailer cross the station shortly before the collision, moving at the rate of approximately 20 miles per hour. He heard the crash and immediately went to the scene of the accident. He found the tractor about 400 feet south of the gas station, facing northeast with its front end against a concrete divider, which was some 2 feet east of the easterly edge of the pavement of the highway. The semi-trailer was attached to the tractor and facing northeast.

Directly back, or to the north of the semi-trailer, was the trailer. Nye found the left wheel of the semi-trailer 2 or 3 feet east of the center line of the road, and the left rear wheel of the trailer about 1 foot east of this line. Anthony's body was underneath the left rear wheel of the trailer, his body and legs east of the center line of the road. Blood and debris, including a portion of the seat of the automobile which had been torn from the seat, were lying directly east of Anthony's body. Mrs. Anthony was lying in the center of the road about 20 feet north of the rear end of the trailer and the automobile was some 15 or 20 feet north of her.

with its front wheels facing northwest, and just resting on the east side of the pavement, the rest of the car being on the dirt or shoulder of the road. Cave stated that it was just daylight, quite foggy but not raining and that the pavement was dry; that as he approached the place of the accident he did not see any lights until he was approximately 40 feet from the Buick, whose dim headlights he then observed thrown at right angles to his path as he approached the scene of the collision.

The highway at the point of the accident and therabouts, is 20 feet wide. Defendant's vehicle represented a total weight of approximately 16 tons. As a result of the impact, the whole left side of the Buick from the front door back was torn off. The top was gone, the left rear wheel broken, shattered glass thrown all about the highway, and both passengers of the automobile thrown to the pavement. Two witnesses beside Cave stated that the pavement was dry at the time of the collision. All witnesses agreed that there was a rather heavy fog at the time.

Defendant by its brief presents three diagrams, portraying the collision as described by Mrs. Ashamy and defendant's witnesses respectively, showing the relative positions of the two vehicles immediately before the impact, the location of the two bodies on the pavement, and other conditions described by Cave, who was the first person to arrive at the scene of the accident. The evidence of Mrs. Ashamy on the one hand, and that of the driver and his helper on the other, is irreconcilable and the diagrams likewise portray two entirely different versions of the collision. It was thus essentially a question of fact as to how this unfortunate accident occurred.

The evidence clearly shows that Ashamy's body was found to the east of the black line in the center of the road, that much of

the scene of the collision.

The Highway at the point of the accident was two-lane highway, approximately 10 feet wide. Defendant's vehicle was mounted a total weight of approximately 10 tons. As a result of the impact, the whole left side of the truck from the front door back was torn off. The top was gone, the left rear wheel broken, shattered glass thrown all about the highway, and both passengers of the automobile thrown to the pavement. Two witnesses beside Dave stated that the movement was dry at the time of the collision. All witnesses agreed that there was a sudden jolt at the time.

...of the collision he testified that he saw the ...
...witnesses respectively, showing the relative positions of the two
...vehicles immediately before the impact, the location of the two bodies
...and that ...
...first person to arrive at the scene of the accident. The witness
...of the ... and that of the driver and his
...helped on the other, in circumstances and the ...
...collision. It was ...
...a position of fact as to this ...

to the rest of the plant line in the center of the road, that was at the extreme almost about that where's body was found.

the debris was likewise there found, and that the tractor came to a stop way over on the wrong side of the road approximately 3 feet to the east of the easterly line of the highway, against the culvert. Counsel seeks to explain the position of the tractor after the accident by claiming that the steering apparatus of the tractor was damaged through impact with the automobile. There is no evidence, however, that the brakes were in any way defective, nor does it appear why the driver of the tractor did not apply his brakes and bring it to a stop. It may well be assumed that if the tractor had not struck the concrete culvert, it would have proceeded considerably further. Considerable damage was done to the tractor, most of which occurred on the left front side thereof. If defendant's vehicle had been proceeding at about 6 miles an hour, as is claimed by defendant's witness, it would in all likelihood have been possible to bring it to a stop within a few feet. However, these are all questions of fact that were presented to the jury by statements of witnesses, photographs and other circumstances, from which the jury was called upon under proper instructions of the court to determine the ultimate question of liability. The question of the preponderance of the evidence and the deductions to be drawn therefrom, and the probabilities of the statement of the witnesses, and the credibility of their testimony, were all matters particularly within the province of the jury, and from a careful examination of the record we cannot say that the preponderance of the evidence is in favor of defendant, or that the verdict is contrary to the manifest weight of the evidence.

It is urged on behalf of defendant that the plaintiff intestate who was driving the automobile was guilty of contributory negligence, and in support of this contention it is insisted that

the debris was likewise there found, and that the tractor came to a stop very close on the wrong side of the road approximately 3 feet to the east of the easterly line of the highway, against the curb. Counsel seeks to explain the position of the tractor after the accident by claiming that the steering apparatus of the tractor was damaged through impact with the automobile. There is no evidence, however, that the brakes were in any way defective, nor does it appear why the driver of the tractor did not apply his brakes and bring it to a stop. It may well be assumed that if the tractor had not struck the concrete curb, it would have proceeded considerably further. The accident occurred on the left front side thereof. It is believed that a vehicle had been proceeding at about 3 miles an hour, as is claimed by defendant's witness, it would in all likelihood have been possible to bring it to a stop within a few feet. However, these are all questions of fact that were presented to the jury by statements of witnesses, photographs and other circumstances, from which the jury was called upon under proper instructions of the court to determine the ultimate question of liability. The question of the preponderance of the evidence and the deduction to be drawn therefrom, and the probability of the statement of the witnesses, and the credibility of their testimony, were all matters pertaining within the province of the jury, and from a careful examination of the record we cannot say that the preponderance of the evidence is in favor of defendant, or that the verdict is contrary to the manifest weight of the evidence.

It is urged on behalf of defendant that the plaintiff, who was driving the automobile was guilty of contributory negligence, and in support of this contention it is insisted that

Ashamy was driving through a dense fog on a road where there were curves at a speed of 35 to 40 miles an hour, and that in spite of the fact that he saw defendant's truck 75 feet away, he failed to slacken his speed or turn out of the way. The rate of speed with which Ashamy was proceeding varied from 30 to 40 miles an hour, according to the witnesses. Mrs. Ashamy, who was sitting beside her son, was in a much better position to judge the speed of their car than defendant's employees who stated that visibility was poor and limited to a very short distance. As to the slackening of speed, Mrs. Ashamy stated that when they saw defendant's tractor, her son immediately slowed down to approximately 15 miles an hour. At best these were questions for the jury's consideration.

Defendant assigns as error that the general verdict should be set aside because there is a wilful and wanton count in the declaration and no evidence to sustain it. We are inclined to agree with the contention that there is no evidence of wilful and wanton conduct on the part of defendant. O'Neill v. Blair, 261 Ill. App. 470; Streeter v. Mumrickhouse, 261 Ill. App. 557, decided respectively in the third and second district of this state, are relied upon by defendant in support of this contention. In the O'Neill case the declaration charged negligence in five counts and contained two additional counts alleging wilful and wanton conduct. Trial was had on all the counts and the jury rendered a general verdict for plaintiff. Defendant made a motion to set aside the verdict and for a new trial, which was denied by the court. Relying on the case of Grinestaff v. N.Y.C. RR. CO., 255 Ill.App. 583. the court held that since plaintiff had not made out a case of wilful and wanton injury, the verdict could not stand, because as they said, the injury could not have been caused wilfully or wantonly

...they were
...at a speed of 25 to 30 miles an hour, and that in spite of
...the fact that he saw defendant's truck 75 feet away, he failed to
...elaborate his speed or turn out of the way. The rate of speed with
...which Anthony was proceeding varied from 25 to 30 miles an hour,
...according to the witnesses. Mrs. Anthony, when questioned as to her
...own, was in a much better position to judge the speed of their car
...than defendant's witnesses who stated that visibility was poor and
...limited to a very short distance. As to the slowing of speed,
...Mrs. Anthony stated that when they saw defendant's tractor, they
...immediately slowed down to approximately 15 miles an hour. At least
...these were questions for the jury's consideration.

...defendant's witness as to the general picture
...should be not aside because there is a willful and reckless count in
...the declaration and no evidence to sustain it. We are inclined to
...agree with the contention that there is no evidence of willful and
...wanton conduct on the part of defendant. People v. Smith, 201 Ill.
100, 173; People v. McLaughlin, 201 Ill. 100, 173.

...consequently to the trial and second district of Cook County, and
...referred upon by defendant in support of this contention. In the
...O'Neil case the declaration charged negligence in five counts and
...warranted the plaintiff would allege willful and wanton conduct.
...trial was not on all the counts and the jury returned a general
...verdict for plaintiff. Defendant made a motion to set aside the
...verdict and for a new trial, which was denied by the court. Relying
...on the case of Stansfield v. E. F. & S. Co., 208 Ill. App. 202,
...the court held that since plaintiff had not made out a case of
...willful and wanton injury, the verdict could not stand, because as
...they said, the injury could not have been caused willfully or wantonly.

and negligently at the same time. In the Streeter case, supra, where a similar situation existed, the court refused to direct a verdict on the wilful and wanton counts, motions to that effect having been made at the close of all of the evidence. In discussing the question whether a general verdict may stand where the evidence fails to support the wilful and wanton counts, the court likewise quoted from the Grinestaff case, supra, and held that the verdict being general, and there being no evidence to support the wilful counts, the judgment should be reversed. In the case before us, counsel for defendant tendered an instruction at the close of all the evidence to find the defendant not guilty. This was refused by the court. No general motion for a directed verdict was made at the close of plaintiff's case, nor did defendant move the court to withdraw the wilful and wanton counts from the consideration of the jury. Insofar as defendant's counsel failed in this proceeding to make a motion, to withdraw the wilful and wanton count, or to tender an instruction requesting the court to find the defendant not guilty as to the wilful and wanton count, but contented himself with a general motion accompanied by an instruction to find the defendant not guilty, we believe the case may be distinguished from the Grinestaff case. In Scott v. Berlin & Orendorff Co., 245 Ill.460, the court held that a defendant who had not asked the court to instruct the jury that recovery could not be had under certain counts because they were not supported by proof, would not be in a position to complain of a general verdict because some of the counts were not sustained by the evidence. Moreover, in this proceeding no instructions were given the jury on the subject of wilful and wanton conduct. All of the instructions dealing with the law of the case had to do with the question of negligence of the defendant and due care on the part of plaintiff. The case was thus presented to

and negligently at the same time. In the latter case, where a similar situation existed, the court refused to direct a verdict on the willful and wanton counts, holding that effect having been made at the close of all of the evidence, in discussing the question whether a general verdict may stand where the evidence fails to support the willful and wanton counts, the court likewise pointed out the distinction between the two counts, the latter being general, and there being no evidence to support the willful counts, the judgment should be reversed. In the case before us, counsel for defendant tendered an instruction of the effect of all the evidence to find the defendant not guilty. This was refused by the court. No general motion for a directed verdict was made at the close of plaintiff's case, nor did defendant move the court to withdraw the willful and wanton counts from the consideration of the jury. Instead, as defendant's counsel held in this proceeding to make a motion, he withdrew the willful and wanton count, or to tender an instruction requesting the court to find the defendant not guilty as to the willful and wanton count, and requested himself with a general motion announced by an instruction to find the defendant not guilty, to deliver the case to the jury. The defendant was. In re Estate of B. B. B., 100 Cal. 400, 33 P. 2d 100. The court said that a defendant who had not asked the court to instruct the jury that recovery could not be had under certain counts because they were not supported by proof, could not be in a position to complain of a general verdict because some of the counts were not sustained by the evidence. Moreover, in this proceeding no instructions were given the jury on the subject of willful and wanton counts. All of the instructions dealing with the law of the case had to do with the question of negligence of the defendant and the state of the mind of plaintiff. The case was thus presented to

the jury upon the sole theory of negligence and not of wilfulness or wantonness. We must assume that the declaration was not submitted to the jury, because under the well established rule in this state, pleadings in civil actions are not allowed to be taken by the jury when it is sent out to consider of its verdict.

Lerette v. Director General, 308 Ill. 348. Since the question with reference to wilful and wanton conduct was not submitted to the jury by instructions, and we are to presume that they did not have the pleadings in the case, we think there was no error committed by allowing the general verdict to stand. It was so held in

Cipnerly v. Carmack, 258 Ill. App. 593, in a case which involved a situation precisely the same as in the instant proceeding. In

Liska v. Chicago Railways Company, 318 Ill. 570, the third and fourth counts of the declaration charged defendants in error with failure to ring a bell or sound a warning. These counts were not withdrawn, nor were any instructions based upon them given to the jury. The counts to which references were made in the instructions were those which were recited or explained in the instructions.

There was nowhere any reference to the failure of defendant to ring a bell or sound a warning. Neither did it appear in that proceeding that the jury had any information concerning the allegations of the third or fourth counts. The court held there that in the absence of an affirmative showing, it will not be presumed that the jury had any knowledge of the allegations contained in the third and fourth counts. The decision in the O'Neill and Streeter cases, supra, are based upon the principle that an injury cannot be caused wilfully or wantonly and negligently at the same time, and therefore, a general verdict based upon the allegations of both negligence and wilfulness or wantonness cannot stand where there is no evidence to sustain the charges of wilful or wanton conduct because, as the court stated in one of those decisions, "negligence and

the jury upon the sole theory of negligence and not of willfulness or wantonness. We must assume that the defendant was not subjected to the jury, because under the well established rule in this state, pleadings in civil actions are not allowed to be taken by the jury when it is held out for consideration of its verdict.

Harvill v. Harvill, 700 Ill. 546. Since the question with reference to willful and wanton conduct was not submitted to the jury by instructions, and we are to presume that they did not have the pleadings in the case, we think there was no error committed by allowing the general verdict to stand. It was so held in Harvill v. Harvill, 700 Ill. 546, in a case which involved a question precisely the same as in the instant case, in Harvill v. Harvill, 700 Ill. 546, the third and fourth counts of the declaration charged defendants in error with failure to ring a bell or sound a warning. These counts were not sustained, nor were any instructions based upon them given to the jury. The counts to which reference was made in the instructions were those which were framed or explained in the instructions. There was nowhere any reference to the failure of defendant to ring a bell or sound a warning. Neither did it appear in that proceeding that the jury had any information concerning the allegations of the third or fourth counts. The court said that in the absence of an affirmative finding, it will not be presumed that the jury had any knowledge of the allegations contained in the third and fourth counts. The decision in the Harvill and Harvill cases, and based upon the principle that an injury cannot be caused willfully or wantonly and negligently at the same time, and therefore a general verdict based upon the allegations of both negligence and willfulness or wantonness cannot stand where there is no evidence to sustain the charge of willful or wanton conduct.

wilfulness are as unmixable as oil and water." However, it does not appear from either of these decisions whether, as in the instant case, instructions were offered and given to define wilful and wanton conduct so as to place the consideration of that question before the jury. Certainly, in this proceeding the instructions given did not touch upon the question of willfulness or wantonness in any respect, and since that question was not submitted to the jury, the reasoning upon which the O'Neill and Streeter cases, *supra*, is based, appears to be inapplicable to the circumstances of this case.

Some contention is made that the verdict is excessive. Under the statute, the maximum compensation allowable in case of death is \$10,000. Plaintiff's intestate was a young man 24 years of age, apparently in good health, married, and with many years of life and usefulness before him. According to the evidence, he had made arrangements to go into business shortly following the date of the accident. All of these considerations were presented to the jury, and we find nothing of record which would justify us in holding the verdict to be excessive.

We believe the trial was substantially free of error, and for the reasons stated herein, the judgment of the Superior Court will be affirmed.

AFFIRMED.

HEBEL, P.J. CONCURS.

WILSON, J. DISSENTING:

I am unable to concur in the main opinion. The declaration contained a count charging wilful and wanton negligence which was permitted to go to the jury, although a motion was made to direct a verdict at the close of all the evidence.

willfulness and be unexcusable as all and sundry. However, it does not appear from either of these decisions whether, as in the instant

case, instructions were altered and given to define willful and wanton conduct as to place the consideration of that question before the jury. Certainly, in this proceeding the instructions given did not touch upon the question of willfulness or wantonness in any respect, and since that question was not admitted to the jury, the reasoning upon which the O'Reilly and Brewster cases, supra, is based, appears to be inapplicable to the circumstances of this case.

Some contention is made that the verdict is excessive. Under the statute, the maximum compensation allowable in case of death is \$10,000. Plaintiff's intestate was a young man 24 years of age, apparently in good health, married, and with many years of life and usefulness before him. According to the evidence, he had made arrangements to go into business shortly following the date of the accident. All of these considerations were presented to the jury, and we find nothing of record which would justify us in holding the verdict to be excessive.

We believe the trial was substantially free of error, and for the reasons stated herein, the judgment of the Superior Court will be affirmed.

APPROVED.

WILLIAM L. BOWEN.

ALBERT A. O'BRIEN.

I am unable to concur in the main opinion. The decision contained a serious clerical error and certain deficiencies which was permitted to go to the jury, although a motion was made to direct a verdict at the close of all the evidence.

The accident happened about 6:30 on a December morning. The evidence shows that it was dark and that there was a heavy fog. The motor tractor with two trailers owned by the defendant was not proceeding over 20 miles an hour. It was a situation which would require care on the part of both the driver of the motor car and the tractor. There was no evidence in my opinion of wilful and wanton negligence and the count in plaintiff's declaration charging such, should have been withdrawn from the jury. It was error to permit this question to go to the jury when there was not sufficient evidence to support it. I do not believe that the rule that one good count is sufficient where the declaration contains a count of wilful and wanton negligence is applicable, unless there is evidence to sustain such count. Grinestaff v. New York Central R.R. Co., 253 Ill. App. 589; O'Neill v. Blair, 261 Ill. App. 470.

The accident happened about 8:30 on a Tuesday morning.
The evidence shows that it was dark and that there was a heavy fog.
The motor tractor with two trailers owned by the defendant was not
proceeding over 20 miles an hour. It was a situation which would
require care on the part of both the driver of the motor car and
the tractor. There was no evidence in my opinion of either end
neglect negligence and the court in defendant's declaration charging
neglect, should have been withdrawn from the jury. It was error to
permit this question to go to the jury when there was not sufficient
evidence to support it. I do not believe that the rule that one
must wait is sufficient when the declaration contains a charge of
neglect and when negligence is established, unless there is evidence
to sustain such charge. Quinn v. New York Central N.Y. & N.J.
222 Ill. App. 2d, 1954, 1955 Ill. App. 2d.

35396

FRANCIS W. PAINE, HERBERT I. VOSTER,
LEO D. DNAPER, E. J. FUNLONG, W. J.
O'BRIEN, ALBERT P. EVERTS, FRANK R.
HOPE, L. BROOKS LEAVITT, E. C. LUCE,
J. HOWARD LEMAN, M. H. LeGROIX,
KENNETH D. STEERE, STEPHEN PAINE,
and LLOYD W. MASON, doing business
as Paine, Webber & Company,

Appellees,

v.

JAMES SVOLAS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 L.A. 600'

Opinion filed June 15, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action in the Municipal Court of Chicago to recover from defendant a balance of \$1,345.39, alleged to be due on a trading account for the purchase of securities on the stock exchange from October 1, 1929, to October 31, 1930. There was attached to plaintiffs' statement of claim an itemized account of the transactions entered into between the parties during the period in question.

Defendant filed an affidavit of merits averring that the "transactions set up in plaintiff's statement of claim were intended when the contract was made by both parties thereto not to be bona fide sales but merely options to be settled by the difference between the purchase price and the sale price and agreed that such difference should be settled in money and not by the receipt of the commodity, that such transactions were gambling and void and not in accordance with the statutes of the State of Illinois."

Upon the hearing of the cause by the court, without a jury, and under the pleadings, defendant admitted the trading account between the parties and the existing deficit, and that the itemized account attached to plaintiffs' statement of claim substantially represented the transaction between the parties. This

THE STATE OF ILLINOIS,
COUNTY OF COOK,
vs.
JAMES W. HARRIS,
Defendant.

IN SENATE

FILED

SEP 14 1938

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JAMES W. HARRIS

FILED

Opinion filed June 15, 1938

THE COURT IN THIS CASE HAS TO DECIDE
whether the plaintiff's complaint is proper in the
county of Cook. The complaint is for damages
of \$1,000.00, alleged to be due on a trading
account for the purchase of securities on
the 15th day of June, 1938, to-wit: \$1,000.00.
The complaint is for damages of \$1,000.00,
alleged to be due on a trading account for the
purchase of securities on the 15th day of June,
1938, to-wit: \$1,000.00.

Defendant filed an affidavit of merits averring that
the "complaint" set up in plaintiff's statement of claim was
intended when the contract was made by both parties thereto not to
be done like other but merely optional as to be settled by the difference
between the purchase price and the sale price and agreed that such
difference should be settled in money and not by the receipt of the
commodity, that such transaction was gambling and void and not to
be considered with the statutes of the State of Illinois.

Upon the hearing of the cause by the court, although
a jury, and under the pleadings, defendant admitted the trading
account between the parties and the existing deficit, and that the
defendant's account attached as plaintiff's statement of claim was
exactly representative of the transaction between the parties. This

constituted a prima facie case against defendant and then the burden of proving the defense interposed rested upon defendant.

To sustain this burden, defendant testified that in March, 1928, one Lewis introduced him to Mr. Bridgen, who was employed in the capacity of salesman for plaintiffs; that defendant told Bridgen he would like to play the market, "the market up and down, but I don't want the stock, just play up and down", to which Bridgen replied, "Yes, you can do that"; the parties thereupon discussed the marginal requirements and defendant was told by Bridgen that under the rules of the stock exchange a marginal deposit of 35% would be required. Defendant further testified that during the period in question, he never received any stock, but that all transactions were settled on margins. He also admitted that he had no conversation with any member of Paine, Webber & Company, plaintiffs, nor any person other than Bridgen.

Robert J. Lewis corroborated defendant's testimony by stating that he was a bond salesman employed by Paine, Webber & Company during the period in question; that he introduced defendant to Bridgen and heard the ensuing conversation which was substantially as related by defendant.

Plaintiffs thereupon produced Vernon Farava, an employee of plaintiffs', who testified that when an order is received for the purchase of stock, it is telegraphed to the plaintiffs' order clerk in New York, who in turn commissions plaintiffs' floor representative of the New York Stock Exchange to execute the order; that subsequently when certificates representing the stock purchased are delivered to plaintiffs, they hold the same for the customer as security against his account, unless the stock is paid for in full, in which event the certificates are delivered to the customer. He also testified that when a customer pays the balance on his account,

examined a man I call defendant and then the woman of proving the defense advanced toward your defendant.

To prove this woman, defendant testified that in

March, 1932, one Lewis introduced him to Mr. Higgins, who was employed

in the capacity of salesman for defendant; that defendant told

Higgins he would like to buy the watches, "the watches up and down,

but I don't want the stock, just buy up and down", to which Higgins

replied, "Yes, you can do that"; the parties thereupon discussed the

mutual requirements and defendant was told by Higgins that under

the rules of the stock exchange a minimum amount of \$25 would be

required. Defendant further testified that during the period in

question, he never received any stock, but that all transactions

were settled on credit. He also testified that he had no knowledge

that this was a loan, rather a loan, payable, payable, and any

other other than Higgins.

Next, Lewis testified that defendant's testimony

of stating that he was a stock salesman employed by Lewis, was a

company during the period in question; that he introduced defendant

to Higgins and that the latter was a man who was substantially

as stated by Higgins.

Plaintiff further testified that Lewis, as

stated at defendant's, and testified that when an order is received

for the purchase of stock, it is telegraphed to the plaintiff's order

book in New York, who is then telegraphed plaintiff's, their repre-

sentative of the New York Stock Exchange to execute the order; that

subsequently when certificates representing the stock purchased are

delivered to plaintiff, they hold the same for the plaintiff as

security against his interest, which the same is paid for in full,

in which event the certificates are delivered to the plaintiff. He

also testified that when a customer pays the balance on his account,

the certificates are delivered to him, and that plaintiffs pay for the stock which they buy when they execute the customers orders. By this witness, plaintiffs' ledger sheet and account showing the transactions with defendant was also identified and explained.

Joseph Sentore testified that he was employed as an order clerk for plaintiffs, charged with the duty of executing customers orders when received from plaintiffs' salesmen or solicitors; that upon receipt of an order it becomes his duty to communicate the same by private wire to plaintiffs' New York house, where it is 'phoned to the stock exchange for execution; that when an order, whether it be a purchase or sale, is consummated, the New York House wires back to Faine, Gebber & Company, notifying the local salesman of the result. Sentore further testified that plaintiffs actually pay the money when they receive the stock.

For his defense, defendant relies solely upon Chapter 38, Section 130, Cahill's Revised Stats. of Illinois, 1931, and decisions construing the same, which held that when parties deal in commodities with the understanding between them that no deliveries are to be actually made, but that purchases and sales are to be adjusted by the mere settlement of differences in price, such transactions are in the nature of gambling contracts, and therefore, void.

From a careful examination of the record in this case, it appears that the defense interposed rests solely upon the brief conversation alleged to have been had between defendant and Bridgen in March, 1928, when this trading account was initiated. The evidence discloses that Bridgen was a salesman for plaintiffs, and nothing more. His name does not appear among those of plaintiffs who were doing business as Faine, Gebber & Company, and his relationship to them is alluded to by defendant simply as one who was "buying and selling." Defendant made no investigation to determine

the certified and delivered to him, and that plaintiff pay for the stock which they buy when they execute the certificate orders. By this witness, plaintiff, ledger sheet and account showing the transactions with defendant was also identified and explained. Joseph Benton testified that he was employed as an order clerk for plaintiff, charged with the duty of executing certificate orders when received from plaintiff's salesmen or solicitors; that upon receipt of an order it becomes his duty to communicate the same by private wire to plaintiff's New York house, that it is common in the stock exchange to communicate in this manner, whether it be a purchase or sale, is communicated, the New York House wire back to him, under a company, notifying the local salesmen of the results. Benton further testified that plaintiff's secretary say the money when the receive the stock. For his defense, defendant relies solely upon Exhibit B, Exhibit B, Exhibit B, Exhibit B, Exhibit B, Exhibit B, and decisions concerning the same, which held that when parties deal in connection with the understanding between them that no deliveries are to be actually made, but that purchases and sales are to be adjusted by the mere settlement of differences in price, such transactions are in the nature of loaned securities, and therefore, void. From a careful examination of the record in this case, it appears that the witness testimony was fairly used the other conversation alleged to have been had between defendant and witness in March, 1902, when this trading account was initiated. The witness also testified that witness was a salesman for plaintiff, and nothing more. His name does not appear among those of plaintiff who were doing business as before, Webster & Company, and his relation with it is stated to be entirely simply as one who was employed and called. Defendant made no investigation as to whether

the nature and scope of his authority, nor to ascertain whether Bridgen had authority to bind plaintiffs to the alleged unlawful agreement. Under the clear weight of authority, the burden rested upon defendant to prove not only the agreement, but that Bridgen had authority to bind plaintiffs. This rule is well stated in Merchants National Bank of Peoria v. Nichols and Shepard Company, 223 Ill. 41, wherein the court in the course of its opinion, said:

"It is to be remembered that persons dealing with an assumed agent are bound, at their peril, to ascertain not only the fact of the agency, but the extent of the agent's authority. They are put upon their guard by the very fact that they are dealing with an agent, and must, at their peril, see to it that the act done by him is within his power. It is their right and duty to ascertain the extent of his power, and to determine whether his act comes within the power and is such as to bind his principal."

Mechem in his work on Agency, (1 Mechem on Agency, 2nd ed. paragraph 743), states the rule as follows:

"In approaching the consideration of the inquiry whether an assumed authority exists in a given case, there are certain fundamental principles which must not be overlooked. Among these are, as has been seen (1) that the law indulges in no bare presumptions that an agency exists; it must be proved or presumed from facts; (2) that the agent cannot establish his own authority, either by his representations or by assuming to exercise it; (3) that an authority cannot be established by mere rumor or general reputation; (4) that even a general authority is not an unlimited one; and (5) that every authority must find its ultimate source in some act or omission of the principal. An assumption of authority to act as agent for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to 'stop, look and listen'. It is therefore declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it."

Apparently, the conversation between defendant and Bridgen was never brought to the attention of Bridgen's employers to charge them with

had authority to bind himself. This rule is well stated in upon reference to prove not only the agreement, but that witness agreement. Under the clear weight of authority, the court stated witness had authority to bind himself. This rule is well stated in

[illegible]

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which is well known to all who are familiar with the country. It is a fact which is well known to all who are familiar with the country. It is a fact which is well known to all who are familiar with the country.

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"In recommending the investigation of the incident
 whether an accident occurred, which is a hard case, there
 are several important factors which must be con-
 sidered. Among them are: (1) That the in-
 volvement is in a very serious manner that is clearly stated;
 must be proved or disproved from facts; (2) That the in-
 volvement is in a very serious manner, which is the case
 sometimes as to be considered in connection with (1) that an in-
 volvement is established by some means or means of investigation;
 (3) That every investigation must lead to a definite answer
 in case of an accident or the investigation, an investigation is
 established to see if there is a possibility of legal challenges
 existing, like a witness statement, or if there is a possibility
 of a claim of injury and damage the only way to go is
 through the courts. It is therefore advised to be a formalized
 matter to be lost right at the first trial to be overestimated.
 This means that the investigation should be conducted in a
 formal manner as a general rule, and the only way to go is
 through the courts. It may seem odd to say this, but it is
 not only the law of the country but the nature and extent
 of the accident, and in some cases either in connection, the
 nature of the accident should be established.

These are again the subjects of the following chapters.

It is much more of a volume of material to maintain and it is

knowledge of the alleged unlawful agreement, and since the record is silent as to Bridgen's authority to make such an agreement, plaintiffs cannot be charged with responsibility for the undertaking.

Moreover, as appearing from the record, the ledger sheets show that plaintiffs acted as brokers for defendant, purchased the stocks indicated by defendant, for which they received a commission, that defendant put up collateral and cash in order to secure plaintiffs, and that defendant was charged interest on the amounts due plaintiffs. Dividends declared on the various stocks purchased by defendant and received by plaintiffs were credited to defendant's account. No charges were made in defendant's account until the purchases indicated by him had actually been made by plaintiffs. From these facts, it would appear that all of the transactions between the parties were perfectly regular and not in accordance with defendant's conversation with Bridgen. So far as the record discloses, we must assume that plaintiffs had the various stocks on hand. Defendant concedes that he never paid up his account in full, or demanded delivery of any stock. Because of the inconsistency between the circumstances disclosed by these facts and defendant's testimony, we believe the court was justified in finding for plaintiffs.

There is another reason, however, why this judgment should be affirmed. It appears conclusively by the statement of account attached to plaintiffs' statement of claim that on September 30, 1929, defendant had a credit balance of \$4,194.48. Plaintiffs then had in their possession as collateral an Armour & Company \$500 bond and 100 Bethlehem Steel Rights belonging to defendant. On October 1, 1929, the Rights were sold, and the proceeds credited to defendant's account. On the same day, defendant purchased through plaintiffs as brokers, certain stocks. Then came the stock market crash. On October 29, 1929, the stocks so purchased were sold by defendant at greatly depreciated prices. On October 31, 1929,

knowledge of the alleged unlawful agreement, and since the record in
silent as to Wright's authority to make such an agreement, plain-
tiff cannot be charged with responsibility for the understanding.
Moreover, as appearing from the record, the ledger
shows that plaintiff's name as owner for defendant, purchased
the shares indicated by defendant, for which they received a non-
assessable, that defendant put up collateral and cash in order to
secure plaintiff's, and that defendant was charged interest on the
amount due plaintiff. Although included in the return of
purchased by defendant and received by plaintiff were credited
to defendant's account. No charges were made in defendant's account
until the purchase indicated by him had actually been made by
plaintiff. From these facts, it would appear that all of the
transactions between the parties were perfectly regular and not in
conformance with defendant's conversation with Wright. So far as
the record discloses, we must assume that plaintiff had the various
stocks on hand. Defendant concedes that he never sold up his
account in full, or demanded delivery of any stock. Because of the
interference between the stockholders indicated by these facts
and defendant's testimony, it follows that the record is
favorable for plaintiff.
There is another reason, however, why this judgment
should be affirmed. It appears conclusively by the statement of
account attached to plaintiff's statement of claim that on September
30, 1917, defendant had a credit balance of \$7,124.00. Plaintiff
then had in their possession as collateral an amount of \$2000
bond and 100 Western Union stock rights belonging to defendant. On
September 1, 1917, the right was sold, and the proceeds credited to
defendant's account. On the same day, defendant purchased 100
plaintiff's or Western Union stock. Then came the other sale
of stock. On October 25, 1917, the stock on purchased was sold by

defendant owed plaintiffs \$53.12. On the same day, according to the statement of claim, plaintiffs loaned defendant \$1,600.00 in cash. This entry is unexplained, but it is in evidence, and we must assume that it was a cash advancement. This loan made defendant's debit balance \$1,653.12. Coupons attached to the Armour & Company bond were clipped, cashed and credited to defendant's account. The defendant was debited with the amount of interest charged monthly. Finally, on October 31, 1930, the Armour & Company bond was sold for \$379.17, which when credited to the defendant's account, reduced his debit balance to \$1,345.39, the amount sued for. The foregoing facts and figures all appear on plaintiffs' statement of account and are not denied. The \$1,600.00 loan is included in the account. No subsequent purchases or sales were made and, consequently, we believe that plaintiffs are justified in basing their claim on the item of \$1,600.00 cash paid to defendant. Defendant by his reply brief insists that the case was not tried upon the theory of a suit to recover for money loaned, but was predicated upon a balance due on a trading account and for an account stated. This might be true if the statement of account had not been attached to plaintiffs' statement of claim, admitted in evidence, and conceded to be correct. The admissions of record should not preclude defendant from denying the validity of plaintiffs' claim.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

defendant used Plaintiff's \$100.00. On the same day, according to the statement of claim, Plaintiff loaned defendant \$1,500.00 in cash. This entry is unexplained, but it is in evidence, and we must assume that it was a cash advancement. This loan made defendant's debit balance \$1,400.00. Checks attached to the answer & Germany bond were signed, cashed and credited to defendant's account. The defendant was debited with the amount of interest charges monthly. Finally, on October 21, 1937, the answer & Germany bond was sold for \$270.17, which when credited to the defendant's account, reduced his debit balance to \$1,129.83. The account used for the foregoing facts and figures all appear as Plaintiff's statement of account and are not denied. The \$1,500.00 loan is included in the account. An subsequent purchase of sales were made and, consequently, we believe that Plaintiff was justified in basing their claim on the item of \$1,500.00 cash paid to defendant. Defendant by his reply brief insists that the case was not tried upon the theory of a sale to recover the money loaned, but was predicated upon a balance due on a trading account and for an account stated. This right we find in the statement of account had not been attached to Plaintiff's statement of claim, admitted in evidence, and conceded to be correct. The admissions of record should not preclude defendant from denying the validity of Plaintiff's claim.

The judgment of the Municipal Court will be affirmed.

WITNESSES.

WENDEL, J. L. AND WILSON, J. D. COURT.

35499

CLEO WILLIAMS,

(Plaintiff) Appellee,

v.

CONSUMERS COMPANY, a corporation,

(Defendants) Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

267 I.A. 600

Opinion filed June 15, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on the case to recover damages for injuries alleged to have been sustained by reason of a collision between an automobile in which she was a passenger and defendant's truck. Trial was had by the court and a jury, resulting in a verdict and judgment for \$3,000.

The facts disclose that about 2:30 a. m. on October 27, 1928, plaintiff was a passenger in a Chevrolet automobile owned by one John McCarthy and operated in an easterly direction on 56th Street, also known as Garfield Boulevard. This thoroughfare has a two-way drive, that on the south being provided for eastbound traffic, and the north driveway for westbound traffic. Plaintiff and McCarthy were riding in the front seat of the Chevrolet and one Walter Hanson occupied the rear seat. The morning was rainy and misty, and according to plaintiff's testimony, McCarthy was driving at a rate of about 18 or 20 miles per hour. As they approached Wabash Avenue, plaintiff was the first to observe defendant's truck with two trailers approaching from the north about 30 feet from the intersection, and thereupon screamed "look out". McCarthy saw the truck at about the same time and turned his car north into Wabash Avenue in an attempt to pass around the rear of the truck. He cleared the truck but struck the rear trailer, damaging the left front fender and left side



EXHIBIT 100

STATE OF TEXAS
COUNTY OF DALLAS

(Plaintiff) vs. (Defendant)

v.

COMMISSIONER OF THE STATE OF TEXAS

(Plaintiff) vs. (Defendant)

2671A.000

Opinion filed June 18, 1938

MR. JUSTICE DELIVERED THE OPINION OF THE COURT.

PLAINTIFF brought an action on the case to recover

damages for injuries alleged to have been sustained by plaintiff as a result of a collision between an automobile in which she was a passenger and

defendant's truck. Trial was had by the court and a jury, resulting in a verdict and judgment for plaintiff.

The facts alleged that about 8:30 a. m. on October 27, 1937, plaintiff was a passenger in a motorist automobile owned by

one John McArthur and operated in an easterly direction on 15th Street,

also known as East 15th Street. This intersection is a two-way

drive, that on the south being provided for eastbound traffic, and

the north driveway for westbound traffic. Plaintiff and McArthur

were riding in the front seat of the Chevrolet and one Walter Hansen

occupied the rear seat. The morning was rainy and misty, and according

to the plaintiff's testimony, McArthur was driving at a rate of

about 15 to 20 miles per hour, at that time when the collision

plaintiff was the first to observe defendant's truck with two trailers

approaching from the north about 35 feet from the intersection, and

thereupon uttered "look out". McArthur saw the truck at about the

same time and turned his car north into which Hansen in an attempt

to pass around the rear of the truck. He claimed the truck had

stopped the rear trailer, blocked the left front trailer and left also

of his car. The truck was equipped with oil lanterns in the front and rear. The trailers had the framework of lanterns hanging under each, but there is a conflict as to whether these lanterns were lighted.

The driver of the truck, George Nelson, and his helper, Julius Hansen, testified that the Chevrolet in which plaintiff was riding was traveling at a speed of about 35 miles per hour; that the truck and trailers reached the intersection, came to a stop and when they saw the Chevrolet approaching from the west about a block away started to cross Garfield Boulevard, and had gotten the last trailer about 15 feet onto the boulevard when the Chevrolet struck the rear trailer. They left their truck and trailers standing in the boulevard for some 15 minutes while they investigated. Their front and rear lights were lighted, but the lights on the trailer were out, and Hansen testified that they had evidently been extinguished when the trailer was struck by the Chevrolet.

As a result of the impact, plaintiff was thrown down in the front of the car and her left shoulder jammed against the steering wheel; she also struck her chin against the dashboard and received other injuries.

It is first urged as grounds for reversal that plaintiff failed to make out a prima facie case as charged in the declaration in that the various counts alleged that the motor vehicle and trailers of defendant were caused to and did collide with great force and violence against the automobile in which plaintiff was riding, and that diverse bones of her body were broken, whereas, the proof failed to sustain these allegations, resulting in a variance. Various cases are cited to sustain defendant's position, but Buckley v. Mandel Brothers, 333 Ill. 368, is chiefly relied upon.

of his car. The trunk was equipped with all lanterns in the front and rear. The trailer had the headlights at lantern hanging order each, but there is a conflict as to whether these lanterns were

lighted. The driver of the truck, George Wilson, and his helper, John Bennett, testified that the Chevrolet in which plaintiff was riding was equipped with a light which was lighted.

The truck and trailer reached the intersection, came to a stop and when they saw the Chevrolet approaching from the west about a block west of the intersection, they started to move forward.

Plaintiff testified that he saw the Chevrolet when the Chevrolet started to move forward. They left their truck and trailer standing in the roadway for some distance while they investigated. Their truck and trailer lights were lighted, but the lights on the trailer were not, and Wilson testified that they had not lighted them.

Plaintiff testified that the trailer was struck by the Chevrolet. As a result of the impact, plaintiff was thrown down in the front of the car and hit left shoulder against the rear wheel; she also struck her chin against the dashboard and

received other injuries.

It is thus urged by plaintiff that plaintiff

failed to make out a prima facie case as charged in the declaration

in that the various counts alleged that the motor vehicle and

trailer of defendant were caused to and did collide with plaintiff

and violence against the automobile in which plaintiff was

riding, and that driver knew of her body were broken, fractured,

the wheel failed to sustain these allegations, resulting in a verdict.

Various cases are cited to sustain defendant's position, but

Smith v. Smith, 220 Ill. App. 2d, 100, is directly in point.

In that case, it was alleged that the defendant's truck ran into, upon and against plaintiff, while the proof indicated that plaintiff's motorcycle ran into defendant's truck. This presents a different situation from that before us. Moreover, in the latter decision, the court pointed out that a variance between the declaration and the proof should be pointed out at the trial so as to give plaintiff an opportunity to amend his declaration. Failure so to do precludes the defendant from raising the question on appeal. It was so held in Garney v. Marquette Third Vein Coal Mining Co., 280 Ill. 230, and Illinois Life Association v. Wells, 200 Ill. 445, where the court under similar circumstances said that in order to avail of a material variance between allegations and proofs, the testimony must be specifically objected to at the time it is offered and the variance pointed out.

It is next urged that the verdict was contrary to the law and manifest weight of the evidence. The question of liability in this case depended upon several conflicting facts as heretofore pointed out, relative to the speed of the automobile, whether the lights of the trailers were lit and other circumstances. The determination of these questions depended upon the credibility of the witnesses whom the court and jury had an opportunity of observing, and we are not disposed to disturb the verdict on this ground.

Defendant also asserts that plaintiff was guilty of contributory negligence in that she failed to observe the truck in time to avoid the collision. The evidence discloses, however, that it was raining and plaintiff could see through the windshield only in one portion thereof where it had been cleared by the windshield wiper in front of the driver, and that immediately upon observing the truck she called the driver's attention thereto by screaming "look out." This does not indicate an omission of any reasonable or

In that case, it was alleged that the defendant's truck was into-
upon and against plaintiff, while the proof indicated that plain-
first defendant was not defendant's truck. This indicates a
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decision, the court pointed out that a variance between the testi-
mony and the proof should be pointed out at the trial so as to give
plaintiff an opportunity to meet his decision. Failure to do
so precludes the defendant from raising the question on appeal.
It was so held in Carney v. Harwood, 111 Cal. 2d 101, 102.
111 Cal. 2d 101, 102, 111 Cal. 2d 101, 102.
When the court makes a finding of fact, it is not to
avail of a material variance between allegations and proofs, the
testimony must be specifically objected to at the time it is
offered and the variance pointed out.
It is now urged that the verdict was contrary to the
law and manifest weight of the evidence. The question of liability
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pointed out, relative to the speed of the automobile, whether the
lights of the trailer were lit and other circumstances. The deter-
mination of these questions depended upon the credibility of the
witnesses whom the court and jury had an opportunity of observing,
and we are not disposed to disturb the verdict on this ground.
Defendant also asserts that plaintiff was guilty of con-
tributory negligence in that she failed to observe the truck in time
to avoid the collision. The evidence disclosed, however, that it
was raining and plaintiff could see through the windshield only in
one position thereof where it had been cleared by the windshield
wiper in front of the driver, and that immediately upon observing
the truck she called the driver's attention thereto by screaming
"Look out." This does not indicate an omission of any reasonable or

prudent effort on her part to avoid danger, and the law does not impose upon the passenger of an automobile any greater duty than was exercised by plaintiff in this case.

In the course of McCarthy's examination, he testified that he went down to the defendant's place of business on Saturday morning following the accident. He was then asked, "What did you do, if anything?" and replied, "I went up there and explained to him and he sent me to the insurance company." Defendant thereupon moved the court to withdraw a juror, which was denied. Defendant contends that this prejudicial error. The courts of our state have passed upon this question at various times. In Smullen v. Aronson, 253 Ill. App. 540, one of the witnesses testified that "a man from the insurance company" scratched certain things from a paper concerning which he was testifying, and other questions of a similar character were asked and answered. A motion was there likewise made to withdraw a juror and refused. The court in holding that this evidence was not reversible error said that from such testimony the jury could not find any foundation for assuming that defendant's liability in the case was covered by accident insurance, and if they did, they would necessarily have to draw on their imagination, which would be entirely unwarranted. We believe this represents the correct rule and do not regard McCarthy's answer such prejudicial error as to warrant a new trial.

The defendant complains of the size of the verdict. Plaintiff's doctor testified that upon examining her six days after the accident he found a bruise on the top of her head about an inch wide and three inches long, swollen to the extent of practically a half inch; a bruise on the back of her neck from a little below the base of the skull down on the left side; a bruise on the left arm between the elbow and shoulder and several smaller cuts on her chin; that her left shoulder was protruding upward about a half inch and

present effort on her part to avoid danger, and the law does not im-
pose upon the passenger of an automobile any greater duty than was
exercised by plaintiff in this case.

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that he went down to the defendant's place of business on Saturday
morning following the accident. He was then asked, "What did you
do, if anything?" and replied, "I went up there and explained to
him and he sent me to the insurance company." Defendant then
moved the court to withdraw a juror, which was denied. Defendant
contends that this prejudicial error, the source of our error
have caused this decision to be wrong. In People v. [illegible]
[illegible], 100 Ill. App. 2d, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The defendant complains of the size of the verdict.
Plaintiff's doctor testified that upon examining her six days after
the accident he found a bruise on the top of her head about an inch
wide and three inches long, swollen to the extent of practically a
half inch; a bruise on the back of her neck from a little below the
base of the skull down on the left side; a bruise on the left arm
between the elbow and shoulder and several smaller ones on her arm;
that her left shoulder was protruding upward about a half inch and

the shoulder blade away from the back about one inch, and that she complained of pain in that region. By medical tests, he found the back of her shoulder to be numb and that there were regular patches of numbness and extreme sensitiveness down the arm. This witness stated that her condition did not improve under his treatment, and in his opinion it would never improve, there being an atrophy of the muscles holding the shoulder in place, caused by the degeneration of the nerves supplying those muscles. To rebut this evidence, defendant produced the testimony of a physician who had never seen the plaintiff, and based his opinion upon a hypothetical question containing substantially the facts heretofore stated. It was this physician's opinion that these circumstances "simulated the same condition we have with infantile paralysis", and based upon the opinion thus expressed, counsel argues that defendant's injuries were due to some other cause than the collision in question. It appears from the evidence that plaintiff was examined by defendant's doctor and a specialist immediately after the accident and before her own doctor had examined her. Neither of defendant's examining physicians were produced upon the trial, and it seems to us that if plaintiff wished to disprove plaintiff's theory and evidence as to the extent of the injuries they might have done so by the direct testimony of the physicians who had information based upon something other than a hypothetical question. However, the question of injuries was one for the jury's consideration, and we do not regard the verdict of \$3,000 so excessive so as to justify a new trial nor remittitur.

Other points raised by defendant's brief have had our consideration, but are not of sufficient merit to justify disturbing the verdict.

For the reasons stated, the judgment of the Superior Court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

the shoulder blade away from the back about one inch, and that she complained of pain in that region. By medical tests, between the back of her shoulder to be numb and that there were regular patches of numbness and extreme sensitiveness down the arm. This witness stated that her condition did not improve under this treatment, and in his opinion it would never improve, there being an atrophy of the muscles holding the shoulder in place, caused by the degeneration of the nerves supplying those muscles. To rebut this evidence, defendant produced the testimony of a physician who had never seen the plaintiff, and based his opinion upon a hypothetical question containing substantially the facts heretofore stated. It was this physician's opinion that these circumstances "attestified the same condition as have with inflexible regularity," and based upon the opinion thus expressed, counsel argued that defendant's injuries were due to some other cause than the collision in question. It appears from the evidence that plaintiff was examined by defendant's doctor and a specialist immediately after the accident and before her own doctor had examined her. Neither of defendant's examining physicians were produced upon the trial, and it seems to us that if plaintiff wished to disprove plaintiff's theory and evidence as to the extent of the injuries they might have done so by the direct testimony of the physicians who had information based upon something other than a hypothetical question. However, the question of injuries was one for the jury's consideration, and we do not regard the verdict of \$3,000 as excessive so as to justify a new trial nor the verdict.

For the reasons stated, the judgment of the superior court will be affirmed.

Other points raised by defendant's brief have had our consideration, but we are of sufficient mind as to the propriety of the verdict.

35508

JACK HAWKINS,

Appellee,

v.

HEISLER & JUNGE COMPANY,
a corporation,

Appellant.

14
APPEAL FROM

7
SUPERIOR COURT

COOK COUNTY.

267 L.A. 600

Opinion filed June 15, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of trespass on the case to recover for personal injuries alleged to have been caused by reason of a collision between his automobile and defendant's truck at the intersection of 35th Street and Wentworth Avenue in the City of Chicago, on November 9, 1928. Trial was had before the court and a jury, resulting in a verdict and judgment for \$1,300.00.

Among the assignments of error, there appears one affecting the propriety of the court's ruling as to the admissibility of evidence, which in our opinion, materially affected the amount of the verdict. The record, as applicable to this assignment of error, discloses that defendant offered in evidence time sheets showing the amount of work done by plaintiff from November 10, 1928, the day following the accident, until December 28, 1929, to rebut plaintiff's evidence that because of the injury sustained by him, his earning capacity had been materially decreased for a considerable period following the collision. These records were offered by a witness, James Overeek, employed by the International Harvester Company, where plaintiff works. Overeek's position was that of chief timekeeper. His duties were to go around the plant and check up on the timekeepers to see that their work was properly done. The timekeepers were under his supervision. He testified that he had with him the records of plaintiff's employment starting with the

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Opinion filed June 15, 1933

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plaintiff brought an action of trespass on the case to recover for personal injuries alleged to have been caused by reason of a collision between his automobile and defendant's truck at the intersection of 36th Street and Lawrence Avenue in the City of Chicago, on November 8, 1925. Trial was had before the court and a jury, resulting in a verdict and judgment for \$1,500.00.

and the testimony of the doctor's wife as to the possibility of evidence, which in our opinion, materially affected the amount of the verdict. The verdict, as applicable to this assignment of error, is reversed and remanded with directions to the court to set aside the amount of work done by plaintiff from November 1st, 1928, to the day following the accident, until December 22, 1928, to read plaintiff's evidence that because of the injury sustained by him, his earning capacity had been materially decreased for a considerable period following the collision. These records were taken by a witness, James Overton, residing by the International Harvester Company, where plaintiff works. Overton's position was that of chief foreman. His duties were to go around the plant and check up on the employees as to their work and property done. The employees were under his supervision. He testified that he had also his the records of plaintiff's employment starting with the

week ending November 10, 1928, and continuing to the week ending December 28, 1928. Overcock testified that the manner of making out of time sheets was to have clerks prepare them under his direction; that he checked these time sheets with the payroll to see that the hours were correctly taken and transcribed on the time sheets, and that employees were paid according to the time sheet record; also that the records were made out at the time of the employment and that the timekeeper made the actual physical entries on the sheets.

J. A. Morrison, called on behalf of defendant, testified that he was chief timekeeper in the foundries of the International Harvester Company and had charge of plaintiff's time; that the time sheets produced were made under his direction and the clerk who made the entries was working under his direct supervision. Also that the time sheets were in the same condition at the time of the trial as they were when originally made. These time sheets were offered in evidence. Plaintiff objected to their admissibility and the court sustained the objection. Defendant sought by these time sheets to show that plaintiff's wages for the period in question were in excess of those prior to the collision, and if this was a fact, it would, of course, have a material bearing upon the amount of the verdict.

It is undoubtedly true as stated in Wigmore on Evidence, Section 1521, that the mercantile inconvenience of producing all the clerks, salesmen, teamsters or the like who had contributed their knowledge on making up the items of voluminous accounts, is by the courts generally recognized as a sufficient ground for non-production, and that the policy of the courts, so far as it exempts from the production of all but one verifying person who is familiar with the records, on grounds of mercantile inconvenience, is deserving of common adoption.

week ending November 10, 1938, and continuing to the week ending December 20, 1938. Gypsum testified that the manner of making out of time sheets was to have clerks prepare them under his direction; that he checked these time sheets with the payroll to see that the hours were correctly taken and transcribed on the time sheets, and that employees were paid accordingly. Later time sheets were also that the records were made out at the time of the employment and that the timekeeper made the actual physical entries on the sheets.

J. A. Harrison, called on behalf of defendant, testified

that he was chief timekeeper in the laboratory of the International Harvester Company and had charge of plaintiff's time; that the time sheets produced were made under his direction and the clerk who made the entries was working under his direct supervision. Also that the time sheets were in the same condition at the time of the trial as they were when originally made. These time sheets were offered in evidence. Plaintiff objected to their admissibility and the court sustained the objection. Defendant sought by these time sheets to show that plaintiff's wages for the period in question were in excess of those paid to the defendant, and it was a fact, it would, at least, have a material bearing upon the amount of the verdict.

It is undoubtedly true as stated in argument on defendant's

motion 1938, that the material inconsistency of producing all the other, business, documents by the time who had furnished their knowledge on making up the items of voluminous accounts, as by the court generally recognized as a sufficient ground for non-production, and that the policy of the court, as far as it respects, from the production of all but the verified items who is familiar with the records, as stated in defendant's motion, is resulting in a

The courts of our state have recognized this principle and given expression thereto in several cases. It appears that in Chisholm v. Seaman Machine Co., 160 Ill. 101, that workmen made out time slips for labor performed. The foreman examined the time slips and checked them. The bookkeepers of the company entered the time slips in time books provided for that purpose and checked and corrected errors throughout. The bookkeeper testified at the trial as to the correctness of the books. The foreman testified at the trial as to the correctness of the slips, but the workmen who actually made out the time slips were not produced. The court held, nevertheless, that the books were admissible. The time slips excluded in this proceeding seem to us less distantly removed from the person who made the actual entry than they were in the Chisholm case.

In Cooke v. People, 231 Ill. 2, the trial court admitted in evidence the books of a bank which had been verified by a cashier who had not himself made the entries therein. In Richardson v. Seymour, 235 Ill. 319, the delivery book of a tug boat captain was admitted in evidence where it was shown that wheelbarrow loads delivered to the boat were checked off by the captain "or by someone else," the original delivery books having been lost or destroyed. In Pittsburg, Cincinnati, Chicago & St. Louis Railroad v. Chicago, 242 Ill. 178, the loads contained on certain freight cars which had been destroyed, was a question in issue. The court admitted in evidence reports of the arrival of these freight cars, which were made up in part from the report sheets of several employees and verified by the clerk who entered the reports, and by conductors who submitted the original report of arrival.

When the time sheets in this proceeding were produced upon the hearing, plaintiff made no objection to the testimony that

The courts of our state have recognized this principle and given expression thereto in several cases. It appears that in Richardson v. Thomas, 101 Ill. 101, that workers made and time slips for labor performed. The foreman examined the time slips and checked them. The bookkeepers of the company entered the time slips in time books provided for that purpose and checked and corrected errors. The foreman testified at the trial as to the correctness of the slips, but the workers who actually made out the time slips were not produced. The court held, nevertheless, that the slips were admissible. The time slips excluded in this proceeding seem to me less admissibly removed from the person who made the actual entry than they were in the Richardson case.

In Richardson v. Thomas, 101 Ill. 101, the trial court admitted in evidence the books of a team which had been verified by a co-owner who had not himself made the entries therein. In Richardson v. Thomas, 101 Ill. 101, the delivery book of a tug boat captain was admitted in evidence where it was shown that when the boat was chartered off by the captain "at my command" the original delivery book being lost or destroyed.

In Richardson v. Thomas, 101 Ill. 101, the books contained on certain freight cars which had been destroyed, was a question in issue. The court admitted in evidence reports of the arrival of these freight cars, which were made up in part from the report sheets of several employees and verified by the clerk who entered the receipts, and by comparison the original report of arrival.

That the time slips in this proceeding were produced after the hearing, the plaintiff would be prejudiced in the testimony that

they related to the employment of plaintiff, Hawkins. The sheets were of considerable evidentiary value and would have helped the jury to determine one element of damage claimed by plaintiff. Plaintiff's brief contains several citations to support the court's ruling in excluding these documents. Upon examination of these citations, however, we find them inapplicable for various reasons. In McDavid v. Ellis, 78 Ill. App. 381, there was involved the question of the best evidence rule. Although the original was in possession of one of the parties, he offered copies of the document. In Griffith v. Sanitary District, 174 Ill. App. 100, the entries had been copied several times before they were finally entered in the book, produced in evidence and were excluded on that ground. Upon due consideration of the question involved in this assignment of error, we believe that the court improperly excluded these time sheets. This question being quite material to the issue, as heretofore stated, evidently had considerable bearing upon the verdict, and for that reason, the judgment cannot stand.

The principal issue involved is one of fact relating to the manner in which the collision occurred, the question of the proximate cause, contributory negligence, and the ultimate liability, if any, to defendant. Inasmuch as the cause will have to be retried, we refrain from commenting on the evidence.

For the reasons stated, the judgment of the Superior Court will be reversed and the cause remanded.

REVERSED AND THE CAUSE REMANDED.

HEBEL, P.J. AND WILSON, J. CONCUR.

they related to the assignment of liability. Nothing. The above
were of considerable evidentiary value and would have helped the jury
to determine one element of damage claimed by Plaintiff. Plaintiff's
first contention seemed likewise to support the expert's testimony in
concluding that defendant's. Upon examination of these affidavits,
however, we find them inadmissible for various reasons. In Waller
v. Wall, 78 Ill. App. 3d, there was involved the question of the
best evidence rule. Although the original was in possession of one
of the parties, he refused to produce it. In Waller v.
Langstaff, 174 Ill. App. 3d, the original had been copied
several times before that time. Finally, in the case, produced
is relevant and was admitted as such. Upon the examination
of the question involved in this assignment of error, we believe that
the court improperly excluded these two affidavits. These affidavits
being quite material to the issue, as defendant stated, evidently
had considerable bearing upon the verdict, and for that reason, the
affidavits should have been admitted.

The original issue involved is one of fact relating to
the manner in which the collision occurred, the location of the prop-
erty, the testimony of the witnesses, and the witness statements.
It may be defendant. Inasmuch as the issue will have to be retried,
we refrain from commenting on the evidence.

For the reasons stated, the judgment of the Appellate
Court will be reversed and the cause remanded.

REVEREND AND THE COURT REMANDS.

35542

H. G. HAMS,

Appellee,

v.

ALEX LOCASHIO,

Appellant.

APPEAL FROM

MUNICIPAL COURT

267 1st. 0001
OF CHICAGO.

Opinion filed June 15, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant in the Municipal Court of Chicago for damages sustained to his automobile by reason of a collision with defendant's car at the intersection of Elmhurst and Elgin Roads, about eight miles west of Evanston, Illinois. The cause was tried before the court and a jury, resulting in a verdict and judgment for \$300.00.

Briefly stated, the evidence discloses that plaintiff was being driven north on Elmhurst Road in an automobile operated by his wife. As he approached Elgin Road, his car either slowed down or came to a full stop. There is some conflict in the evidence upon this question. Defendant was driving his car along Elgin, or Seegar Road, at a rate of speed varying from 30 to 50 miles an hour, according to the testimony of various witnesses. Elgin Road is a through street, and there were stop signs for traffic on Elmhurst Road where it intersects the main highway. Plaintiff's car had proceeded to about the center of the main highway when defendant's automobile struck it, causing considerable damage to plaintiff's car. The evidence is conflicting as to the manner in which the collision occurred, but because this cause will have to be re-tried we refrain from commenting on the testimony.

The court instructed the jury as to the rule of law pertaining to the right of way in four or five different ways, and

Page

M. C. NAME

County

v.

ALAN ROBINSON

City

Opinion filed June 15, 1935

THE COURT HEREIN ADVISES THE JURY OF THE FACTS

RELEVANT TO THE CASE AND THE EVIDENCE IN THE CASE

County of Chicago for damages sustained to his automobile by reason of a collision with defendant's car at the intersection of Highway and Eight Road, about eight miles west of Evanston, Illinois. The case was tried before the court and a jury, resulting in a verdict and judgment for \$500.00.

Specifically stated, the evidence discloses that plaintiff was being driven north on Highway Road in an automobile operated by his wife. As he approached Eight Road, his car either slowed down or came to a full stop. There is some conflict in the evidence upon this question. Defendant was driving his car along Eight Road at a rate of speed varying from 25 to 30 miles an hour, according to the testimony of various witnesses. Eight Road is a through street, and there were stop signs for traffic on Highway Road there to intersect the main highway. Plaintiff's car had proceeded to about the center of the main highway when defendant's automobile struck it, causing considerable damage to plaintiff's car. The evidence is conflicting as to the manner in which the collision occurred, but because this case will have to be re-tried we refrain from commenting on the testimony.

The court instructed the jury as to the rule of law pertaining to the right of way in four or five different ways, and



Plaintiff

Defendant

808 L.A. 000

CV 12345

with reference to the duty of the respective parties to stop at the intersection. The gravamen of these instructions was that plaintiff had the right of way, the court evidently relying upon Chapter 95-4, Section 34, Cahill's Illinois Revised Statutes, 1931. This section of the statute reads as follows:

"Except as hereinafter provided, motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right, and shall have the right-of-way over those approaching from the left."

One of the exceptions to the foregoing provision is Sub-Section #3 thereof, which provides that where a street or other thoroughfare in cities, villages and towns, which has been designated and marked by the Department of Public Works and Buildings to extend or connect such roads, the vehicle should come to a full stop as near the right of way line as possible before driving on the paved portion, and regardless of direction, shall give the right of way to vehicles upon said highway and at all intersections of highways where, by the provision of Sub-section #3, a stop is required before entering upon the intersecting highway. Under the provision of this sub-section, the defendant had the right of way, and consequently, the instructions were erroneous and misleading.

Because of this error, the judgment will be reversed and the cause remanded.

JUDGMENT REVERSED AND THE CAUSE REMANDED.

HEBEL, P.J. AND WILSON, J. CONCUR.

with reference to the duty of the respective parties to stop at the intersection. The provisions of these instructions was that plaintiff had the right of way, the court evidently finding some mistake as to the position of the vehicle involved, and the court's decision.

of the statute reads as follows:

'Except as hereinafter provided, every vehicle traveling in upon public highways shall give the right of way to vehicles proceeding upon intersecting highways from the right, and shall give the right-of-way to those approaching from the left.'

One of the exceptions to the foregoing provision is sub-section 2, which provides that where a street or other thoroughfare in cities, villages and towns, which has been designated and marked by the department of public works and planning is extended or connected with another, the vehicle shall come to a full stop as near the right of way line as possible before driving on the paved portion, and regardless of direction, shall give the right of way to vehicles upon said highway and at all intersections of highways with the provision of sub-section 2, a stop is required before entering upon the intersecting highway. Under the provision of this sub-section, the defendant had the right of way, and consequently, the instructions were erroneous and misleading. Because of this error, the judgment will be reversed.

and the same remanded.

THE COURT REPORTER HAS FOR NAME CHANGED.

RECEIVED, J. A. VAN NISSEN, J. CLERK.

35582
35582.

EMILY ARMOUR,
(Plaintiff) Appellee,

v.

THE PENNSYLVANIA RAILROAD COM-
PANY, a Corporation,
(Defendant) Appellant.

APPEAL FROM SUPERIOR COURT

DAKE COUNTY

267 I.A. 601¹

Opinion filed June 15, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in trespass on the case to recover damages for personal injuries, resulting in a verdict and judgment in her favor for \$6,000.

Briefly stated, the facts disclose that on November 26, 1927, about 8:30 p.m., plaintiff and her husband were driving an automobile in an easterly direction on 79th Street over the tracks of the Baltimore & Ohio and Pennsylvania Railroads, which run parallel in a northerly and southerly direction and are about 80 feet apart at the intersection of 79th Street. Plaintiff's husband was operating said automobile and brought the same to a stop before proceeding over the Baltimore & Ohio Railroad tracks. He then proceeded over the short space separating the latter right of way from the Pennsylvania tracks and came to a stop to the north of the Flagman's shanty, and then proceeded to cross the Pennsylvania tracks when a collision ensued between the locomotive of a freight train going in a northerly direction and plaintiff's car, causing the injuries complained of. The main portion of defendant's brief is devoted to a discussion of the sufficiency of the evidence to sustain the verdict, it being contended that plaintiff was guilty of contributory negligence in failing to observe the oncoming freight train where the view toward the south was unobstructed and under circumstances showing that plaintiff could have avoided the collision by the exercise of reasonable

2.

care. Plaintiff and her husband were the only occurrence witnesses to testify for plaintiff. Defendant produced some seven or eight witnesses to rebut plaintiff's evidence upon the salient questions of fact relative to such matters as the speed of the train, the sounding of warning signals, and the performance of the flagman's duties at the crossing immediately preceding the accident.

Plaintiff asserts, however, that defendant has waived its right to challenge the sufficiency of the evidence to support the verdict, since it did not assign as error the overruling of its motion for a new trial. The record discloses that defendant made a motion for a new trial which was in writing and specified some 16 points relied upon. This motion was denied. The assignment of errors upon the record is substantially a duplicate of the motion for a new trial. The motion for a new trial, together with the exception to the ruling of the court, is incorporated in the bill of exceptions and set forth in habe verba in the abstract of record, but no error is assigned on the ruling of the trial court in denying the motion.

In McConkey v. Pennsylvania Railroad Co., 251 Ill. App. 399, we held under precisely the same circumstances that the denial of the motion for a new trial must be assigned as error. This doctrine has been uniformly followed by our courts in both early and recent decisions. Hunger v. Supancioz, 84 Ill. App. 861; Chicago C.W. Ry. Co. v. Gitchell, 95 Ill. App. 1; Liggett Co. v. Strom, 242 Ill. App. 376. The case of Yarber v. Chicago & Alton Ry. Co., 236 Ill. 560, disclosed at length the origin and history of the motion for a new trial. It was there pointed out that the right to have the action of the trial court in overruling a motion for a new trial reviewed was statutory, but that the statute did not have the effect of changing the practice with reference to questions brought into the record by bills of exceptions, and that the review of the court's rulings during the progress of the trial, such as admitting or excluding evidence, giving

of various signals, and the performance of the T-1000's duties as the first relay line to such matters as the speed of the train, the sounding of warning signals, and the performance of the T-1000's duties as the

THE COURT: The first question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged. The evidence is sufficient to establish that the defendant is guilty of the crime charged.

11

and refusing instructions, was fully preserved by a bill of exceptions without the making of a motion for a new trial. Based upon the authorities hereinabove cited, we concur in plaintiff's contention and hold that defendant's failure to assign as error the overruling of its motion for a new trial constitutes a waiver of its right to challenge the sufficiency of the evidence to support the verdict.

Defendant also contends that the court erred in permitting plaintiff's husband to testify at the trial, asserting that he paid \$250.00 to Dr. H. J. Worthington for professional services rendered in attending Mrs. Armour while she was in the hospital, and upon her return home, and was, therefore, to that extent interested in the result of the suit, rendering him incompetent as a witness in plaintiff's behalf. No case is recited to support the contention. Mr. and Mrs. Armour lived together as husband and wife, and either or both were liable for the family expenses. The physician could have maintained a suit against Mr. Armour had he refused to pay the bill. In meeting this expense, Mr. Armour was merely discharging an obligation which the law imposed upon him and is not indicative of such interest in the result of this proceeding as to disqualify him under the Evidence Act.

The only other ground assigned for reversal relates to the giving of Instructions Nos. 13, 17 and 24, offered at the request of plaintiff. The principal criticism directed against these instructions is that they refer to the negligence charged in the declaration without informing the jury as to the precise nature of the negligence charged. While it is true that the courts of this state in commenting on similar instructions have stated that the practice of making such reference, "while not infrequent, is not to be commended," (1. I. R.R. Co. v. Eide, 179 Ill. 91,) and that the instructions should in a clear concise and comprehensive manner inform the jury as to what material facts must be found to recover or defeat recovery and not leave the jury to construe

THE NATIONAL ASSOCIATION OF THE DEAF AND DUMB, INC., was organized by a bill of incorporation in 1880, and since that time has been engaged in the work of promoting the education and welfare of the deaf and dumb. The association has a large number of branches in various parts of the country, and has been successful in securing the passage of laws for the benefit of the deaf and dumb in many States. The association has also been successful in securing the establishment of schools for the deaf and dumb in many States, and has been successful in securing the employment of deaf and dumb in many occupations.

the pleadings, (Krieger v. S. W. & J. R.R. Co., 343 Ill. 544.), we find no decisions in which instructions of this character were alone made the basis of reversal, and counsel in effect concedes that there are none.

Finding no reversible error and for the reasons stated, the judgment of the Superior Court will be affirmed.

AFFIRMED.

HEBEL, P.J. and WILSON, J. CONCUR.

35848

FRANK J. JACOBSON,
(Plaintiff), Appellant,
v.
NATHAN COHN,
(Defendant) Appellee.

17
Appeal from Order of Municipal
Court of Chicago, setting aside
and vacating judgment entered
after trial and verdict by
jury. 267 I.A. 601

Opinion filed June 15, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This appeal presents for review an order of the Municipal Court, setting aside a judgment in favor of plaintiff for \$219.15, together with interest and cost, rendered upon the jury's verdict on an ex parte hearing had more than 30 days prior to the entry of said order.

The judgment appealed from was rendered June 8, 1931. The order vacating the judgment was entered August 20, 1931. The record discloses that on February 20, 1931, plaintiff instituted his suit against defendant, claiming the principal sum of \$219.15, together with interest thereon, alleged to be due for legal services; that defendant filed his appearance, demand for trial by jury, and affidavit of merits, bringing the cause to issue on April 12, 1931; that thereafter on May 6, 1931, the clerk of the Municipal Court published a civil jury trial calendar of all cases transferred for jury trial between February 14, 1931, and April 30, 1931, which was made available for distribution to the Chicago Bar, and the customary announcement of the issuance thereof was published in the Daily Municipal Court Record for the purpose of bringing the announcement of the calendar to the attention of attorneys, and advising them to watch for calls of cases then pending therein; that the first announcement in the Daily Municipal Court Record appeared on May 5, 1931, and continuously thereafter, daily, until May 13, 1931, and advised attorneys that there would be a first call of such calendar on May 11,

100-100000

FRANK J. LAMON

(Plaintiff), Respondent

v.

NATHAN BORN

(Defendant), Appellant

Opinion filed June 15, 1932

2671.A.601

THE JUDICIAL OFFICE OF THE DISTRICT OF COLUMBIA

This appeal presents for review an order of the Municipal Court, setting aside a judgment in favor of plaintiff for \$115.15, rendered on an ex parte hearing held more than 30 days prior to the entry of said order.

The judgment appealed from was rendered June 3, 1931. The order vacating the judgment was entered August 30, 1931. The record discloses that on February 20, 1931, plaintiff instituted his suit against defendant, claiming the principal sum of \$115.15, together with interest thereon, alleged to be due for legal services; that defendant filed his appearance, demand for trial by jury, and affidavit of merits, praying the case be issue on April 12, 1931; that thereafter on May 6, 1931, the clerk of the Municipal Court published a civil jury trial calendar of all cases transferred for jury trial between February 15, 1931, and April 30, 1931, which was made available for distribution to the public, and the customary announcement of the issuance thereof was published in the Daily Municipal Court Record for the purpose of bringing the announcement of the calendar to the attention of attorneys, and advising them to watch for calls of cases then pending therein; that the first announcement in the Daily Municipal Court Record appeared on May 1, 1931, and was accordingly thereafter, until May 15, 1931, and advised

1931 at 2 o'clock, at which time 150 cases thereon would be called, and that thereafter at 3 o'clock there would be a further call of 150 cases, and announcing the same procedure for May 12, and 13, 1931; that in addition to this general announcement further notice of such first calls of the jury calendar appeared in the Daily Municipal Court Record under the call of Judge Sonstebj, Chief Justice, giving the branch of said court and the number of his courtroom for the days of May 11, 12 and 13 at 2 o'clock in the afternoon; that on May 12, 1931, this case, which appeared as No. 392 on said civil jury trial calendar, was reached on the first call and set for trial June 3, 1931, and assigned to jury courtroom No. 1112; that thereafter said cause appeared and was published in the Daily Municipal Court Record in the call of cases to be heard on the following day in Room No. 1112, presided over by Judge James F. Hardy, as the 25th case on the call; that plaintiff appeared and answered said call, announcing himself ready for trial, but that said cause was not reached on June 3rd, and was thereafter held for trial for the following day, June 5, 1931; that on June 4th said cause appeared and was again published in the call of cases to be heard on June 5th in the same room and before the same judge as the 7th case on the call, and was reached and called for trial on the afternoon of June 5th; that defendant did not appear on either of said dates, or at any of the sessions of said court, and when said cause was called for trial, a jury was impanelled, evidence introduced by plaintiff in support of his statement and affidavit of claim, a verdict returned thereon by the jury in favor of plaintiff and judgment entered accordingly on said date; that thereafter on July 10, 1931, defendant caused execution to issue against defendant; that on July 21st, defendant gave notice to plaintiff that he would thereafter on July 24th appear before Judge Sonstebj, Chief Justice of said court, and present a

1931 at 2 o'clock, at which time the same person would be called, and that thereafter at 3 o'clock there would be a further call of 130 cases, and announcing the same procedure for May 12, and 13, 1931; that in addition to this general announcement further notice of such trial calls of the jury calendar appeared in the daily municipal court record under the call of the jury calendar, which was the branch of said court and the number of his courtroom for the days of May 12, 13 and 14 at 2 o'clock in the afternoon; that on May 12, 1931, this case, which appeared as No. 333 on said civil jury trial calendar, was reached on the first call and set for trial June 7, 1931, and reached on July 10, 1931, and thereafter said case appeared and was published in the daily municipal court record in the call of cases to be heard on the following day in Room No. 1111, located over the City Court, on the 12th day of June on the call; that plaintiff appeared and answered said call, announcing himself ready for trial, but that said case was not reached on June 12, and was thereafter held for trial for the following day, June 13, 1931; that on June 13 said case appeared and was again published in the call of cases to be heard on June 13 in the same room and before the same judge as the 12th case on the call, and was reached and called for trial on the 13th room of June 13; that defendant did not appear on either of said dates, or on any of the sessions of said court, and when said case was called for trial, a jury was furnished, evidence introduced by plaintiff in support of his statement and affidavit of claim, a verdict returned thereon by the jury in favor of plaintiff and judgment entered accordingly on said date; that thereafter on July 10, 1931, defendant ceased execution of issue against defendant; that on July 13, 1931, defendant gave notice to plaintiff that he would thereafter on July 13th appear

motion to vacate said judgment and in support thereof would present his petition and affidavit.

Defendant's petition and affidavit averse in substance that there was associated with him a young attorney named Felchar, whose duty it was to keep check on dates for which various pending cases were set for trial including this proceeding; that on March 30, 1931, affiant instructed said Felchar to inquire at the office of the Chief Justice of said court when the next jury calendar would be issued, and that said Felchar thereafter informed affiant that he had made inquiry of a clerk to the Chief Justice, whose name is not disclosed in the affidavit, and was informed that no further jury calendar would be issued until late in the summer for distribution in the September term of said court; that thereafter said cause, instead of being postponed to the September jury calendar, was set for trial on June 4, 1931, without defendant's knowledge, and that more than 30 days had elapsed before affiant was aware of the entry of said judgment. The petition further alleges facts purporting to constitute a meritorious defense.

The sole question presented for review is whether the court had jurisdiction under Section 21 of the Municipal Court Act (Cahill's Ill. Rev. Stats. 1931, Chap. 37, Par. 805), to set aside the judgment. The law is well settled that the Municipal Court of Chicago has no jurisdiction to set aside and vacate a judgment after the expiration of 30 days from the rendition thereof, except by petition either in the nature of a writ coram nobis, setting forth errors of fact in the record, or in the nature of a bill in equity, setting forth such equitable grounds or circumstances as would justify a court of equity in granting relief. McCord v. Briggs & Turivas, 338 Ill. 158.

motion to vacate said judgment and in support thereof would present his petition and affidavit.

Defendant's petition and affidavit were in substance that there was associated with him a young attorney named Pollock, whose duty it was to keep them on a case for which various pending cases were set for trial including this proceeding; that on March 20, 1931, defendant instructed said Pollock to inquire at the office of the Chief Justice of said court when the next jury calendar would be issued, and that said Pollock thereafter informed defendant that he had made inquiry of a clerk in the Chief Justice's office and it was disclosed in the affidavit that he was informed that no further jury calendar would be issued until later in the summer for distribution in the September term of said court; that thereafter said calendar failed of being prepared in the September jury calendar, was not for trial on June 4, 1932, without defendant's knowledge, and that more than 30 days had elapsed before defendant was aware of the entry of said judgment. The petition further alleges facts purporting to constitute a conspiracy between...

The same petition presented for review to whether the court had jurisdiction under Section 21 of the Municipal Court Act (Section 111, Act No. 100, Laws of the City of New York, 1928) to set aside the judgment. The law is well settled that the Municipal Court of New York has no jurisdiction to set aside and vacate a judgment after the expiration of 30 days from the rendition thereof, except by petition entered in the record of a case within setting forth errors of fact in the record, or in the nature of a bill in equity setting forth such equitable grounds as circumstances so would justify a court of equity to grant relief. People v. Jones & Jones.

It must be conceded, of course, that attorneys are charged with diligence in following the various announcements of court calls and calendars prepared for the purpose of apprising the bar of the pendency of cases. Notice of the preparation of the civil jury calendar appeared in the Daily Municipal Court Record for several days in May, 1931. Furthermore, this proceeding was twice published in said record under Judge Padden's trial call, designating the branch of his court and the court room in which he presided. Ordinary diligence would have called the pendency of this case to counsel's attention, and he should not now be heard to complain because the matter was overlooked by him or his associate, who was charged with that responsibility. Therefore, we do not believe the court was justified in vacating the judgment on equitable grounds or circumstances such as would have justified a court of equity in granting relief.

Defendants rely chiefly on the case of Izzi v. Jalongo, 248 Ill. App. 90, wherein Elmer J. Schnackenberg, an attorney representing defendant, filed a petition to vacate a judgment under Section 21 of the Municipal Court Act, alleging that the cause therein had by agreement of all parties been generally continued by the court and that no notice for setting of the cause for trial was thereafter served upon the petitioner who was attorney of record for defendant; that Schnackenberg visited the office of the Clerk of the Municipal Court and inquired whether a calendar of cases had been prepared to include his proceeding; that the clerk thereupon handed the attorney a list consisting of 15 typewritten sheets, which did not contain said cause; that Schnackenberg thereupon called the clerk's attention to the omission and was told that the only way to have said cause heard would be to serve notice upon the opposing counsel, unless he

It must be understood, of course, that attorneys are
charged with diligence in following the various announcements of
court calls and calendar prepared for the purpose of obtaining the
day of the pendency of cases. Notice of the preparation of the
civil jury calendar appeared in the Daily Municipal Court record for
several days in May, 1921. Consequently, this proceeding was taken
conducted in this record under Judge Lusk's trial call, indicating
the branch of his court and the court room in which he presided.
Ordinary diligence would have called the pendency of this case to
counsel's attention, and he should not now be heard to complain
because the matter was overlooked by him or his associates, who was
charged with that responsibility. Therefore, we do not believe the
court was justified in finding the plaintiff so careless in
its circumstances such as would have justified a court of equity in
granting relief.

Defendant's sole remedy is to file a motion to set aside the
judgment entered in this case. Defendant, in its motion, has
contending defendant, filed a motion to vacate a judgment under Section
51 of the Municipal Court Act, alleging that the cause therein had
by agreement of all parties been generally continued by the court and
that no notice for setting of the cause for trial was thereafter
served upon the petitioner who was attorney of record for defendant;
that Schnackenberg visited the office of the clerk of the Municipal
Court and inquired whether a calendar of cases had been prepared to
include his proceeding; that the clerk thereupon handed the attorney
a list consisting of 16 typewritten sheets, which did not contain
said cause; that Schnackenberg thereupon called the clerk's attention
to the omission and was told that the only way to have said cause
heard would be to serve notice upon the opposing counsel, unless he

desired to wait until the next typewritten calendar of non-jury cases was made up for the ensuing year; that there was no printed calendar made and petitioner first learned in June, 1926, that judgment had been rendered upon an ex parte trial in November, 1925.

These circumstances present an entirely different situation from that before us. In the instant case, a civil jury calendar had been prepared which included this proceeding, due announcement was made on several successive days, and in addition thereto, the cause was twice published on the trial calendar of the judge who entered the judgment. In our opinion, Section 21 has no application to a situation of this kind, and for the reasons stated, we believe the court exceeded its jurisdiction in vacating the judgment after the expiration of 30 days.

The judgment of the Municipal Court will, therefore, be reversed and remanded with directions to expunge the order vacating the judgment and to allow the judgment as entered on June 3, 1921, to stand.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND WILSON, J. CONCUR.

desired to wait until the next September calendar of non-jury cases was made up for the ensuing year; that there was no printed calendar made and petitioner first learned in June, 1932, that judgment had been rendered upon an ex parte trial in November, 1932. These circumstances present an entirely different situation from that before us. In the instant case, a civil jury calendar had been prepared which included this proceeding, the announcement was made on several successive days, and in addition, the case was twice published on the trial calendar of the judge who entered the judgment. In our opinion, Section 31 has no application to a situation of this kind, and for the reasons stated, we believe the court exceeded its jurisdiction in vacating the judgment after the expiration of 30 days.

The judgment of the Municipal Court will, therefore, be reversed and remanded with directions to expunge the order vacating the judgment and to allow the judgment as entered on June 5, 1931.

so stated.

REVEREND THE HONORABLE THE JUDGE.

WITNESSED BY ME, the Clerk of the Court, on this 10th day of June, 1932.

35663 Consolidated with No. 35664

MARY DUPRE,

(Plaintiff) Appellee,

v.

CHICAGO LAW PRINTING COMPANY, a
Corporation,

(Defendant) Appellant.

ANGELA BENVENUTI,

(Plaintiff) Appellee,

v.

CHICAGO LAW PRINTING COMPANY, a
Corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 601

Opinion filed June 15, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This case, consolidated with No. 35664, represents two separate proceedings instituted by Mary Dupre and Angela Benvenuti respectively, in the Municipal Court of Chicago against the Chicago Law Printing Company, based upon claims for unpaid wages and for overtime. The two cases were tried simultaneously under a stipulation that the evidence in the Dupre case should also be considered as the evidence in the Benvenuti proceeding. Both cases were tried before the court without a jury resulting in findings and judgment accordingly in favor of the plaintiff Dupre in the sum of \$1,330, and the plaintiff Benvenuti for \$2,005.

In each instance the cause proceeded to trial on an itemized fourth amended statement of claim, alleging various items of overtime and salary shortage aggregating in excess of \$4,500. Defendant's affidavit of merits admitted the employment in each instance, denied the indebtedness alleged to be due, denied that plaintiffs

20000 Connected with No. 20000

1917

(1917) 1917

v.

CHICAGO AND NORTHWESTERN RAILWAY

Company

(Defendant) Appellant

CHICAGO AND NORTHWESTERN RAILWAY

(Plaintiff) Appellee

v.

CHICAGO AND NORTHWESTERN RAILWAY

Company

(Defendant) Appellee

Opinion filed June 15, 1933

MR. JUSTICE BREWER DELIVERED THE OPINION OF THE COURT.

This case, consolidated with No. 12000, represents two

separate proceedings instituted by Mary Harte and Angela Hennrich respectively, in the Municipal Court of Chicago against the Chicago

and North Western Railway, based upon claims for unpaid wages and for

overtime. The two cases were tried simultaneously under a stipu-

lation that the evidence in the two cases should also be considered

as the evidence in the separate proceedings. Both cases were tried

before the court without a jury resulting in findings and judgment

accordingly in favor of the plaintiff Harte in the sum of \$1,250.

and the plaintiff Hennrich for \$7,000.

In each instance the cases proceeded to trial on an

itemized fourth amended statement of claim, alleging various items

of overtime and salary shortage aggregating in excess of \$4,500.

Defendant's affidavit of service stated the employment in each instance

as, denied the indebtedness alleged to be due, denied that plaintiff

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CHICAGO AND NORTHWESTERN RAILWAY

CHICAGO AND NORTHWESTERN RAILWAY



had worked overtime without compensation, denied any shortage in salaries for the period stated, and alleged the payment of salaries in full each week during the employment and the acceptance of checks representing such payments.

It appears from the evidence that in September, 1928, one Erick M. Hart, who had recently organized the defendant company, was preparing to engage in the law printing business in Chicago; that plaintiffs and Hart had previously been associated with the firm of Hawkins and Loomis, law printers, Hart as solicitor and vice president, and the plaintiffs in the capacity of proof readers and revisers, but that plaintiffs had left the employment of Hawkins and Loomis before Hart severed his connections with that company.

In September, 1928, Hart, accompanied by his wife, visited the plaintiffs in their apartment and discussed with them the proposition of becoming associated with the new company. As a result of this conference, the plaintiff, Benvenuti, commenced work for defendant as proof reader on October 1, 1928, and Miss Dupre assumed her duties in like capacity on October 15, 1928. Both plaintiffs continued in the employ of defendant until January, 1931.

Miss Dupre was paid for her services the sum of \$40.00 per week and Miss Benvenuti received \$45.00 per week until February, 1929, when their respective salaries were voluntarily increased by defendant to \$45.00 and \$50.00 per week respectively. Another increase of \$5.00 per week was given to each plaintiff on June 1, 1929, and a similar increase on July 11, 1929. Thereafter on September 1, 1929, both plaintiffs received a still further increase of \$5.00 per week, making their respective salaries as of that date \$50.00 and \$55.00 respectively. This scale of compensation continued for 65 weeks until December 19, 1930, when because of business conditions

had worked overtime without compensation, denied any shortage in salaries for the period stated, and alleged the payment of salaries in full each week during the employment and the necessity of checks being furnished every Saturday.

It appears from the evidence that in September, 1932, one Erik H. Hunt, who had recently organized the defendant company, was preparing to engage in the law printing business in Chicago; that plaintiffs and Hunt had previously been associated with the firm of Hawkins and Loomis, law printers, Hunt as solicitor and vice president and the plaintiffs in the capacity of book binders and printers, but that plaintiffs had left the employment of Hawkins and Loomis before Hunt entered his connection with that company.

In September, 1932, Hunt, accompanied by his wife, visited the plaintiffs in their apartment and discussed with them the proposition of business associated with the new company. As a result of this conference, the plaintiffs, individually, commenced work for defendant and as proof thereof on October 1, 1932, and Miss Hunt assumed her duties in like capacity on October 15, 1932. Both plaintiffs were placed in the office of defendant until January, 1933.

Miss Hunt was paid for her services the sum of \$45.00 per week and Miss Loomis received \$25.00 per week until February, 1933, when their respective salaries were voluntarily increased by defendant to \$45.00 and \$50.00 per week respectively. Another increase of \$5.00 per week was given to each plaintiff on June 1, 1933, and a similar increase on July 1, 1933. Thereafter on September 1, 1933, both plaintiffs received a still further increase of \$5.00 per week, making their respective salaries as of that date \$50.00 and \$55.00 respectively. This scale of compensation continued for 22 weeks until December 19, 1933, when because of business conditions

their salaries were reduced to \$45.00 and \$50.00 per week respectively, and these sums were paid them until January, 1931, when they left defendant's employ.

During the course of their employment, plaintiffs frequently worked overtime, had vacations with pay, were compensated for days off because of illness and other causes, and no record of their time was kept on an hourly basis. When plaintiffs worked overtime or after business hours, they frequently came to work late on the following day.

In September and October, 1929, plaintiffs each purchased \$500 worth of stock in the defendant company, gave their respective notes for part of the purchase price, and made cash payments for the balance from time to time until the purchase price had been fully paid.

It also appears of record that plaintiffs maintained living quarters with one Pearl Wilkins, defendant's bookkeeper, during most of the time that they were employed by defendant. In May, 1930, plaintiffs engaged the services of an attorney named Grundman and requested him to draw up a written contract covering the employment of plaintiffs and of Pearl Wilkins by the defendant company. At that time defendant was considering a proposal to amalgamate his business with another law printing concern. The document prepared by Grundman was submitted to Hart just prior to the annual stockholders meeting of the defendant in September, 1930, but Hart refused to sign it and the contract was never executed by any of the parties.

The court disallowed all claims for overtime and no assignment of error is made on this ruling. The judgment of the trial court represents an allowance of \$65.00 per week for Miss Dupre and \$75.00 per week for Miss Benvenuti for the entire number of weeks

their salaries were reduced to \$45.00 and \$50.00 per week respectively and these sums were paid them until January, 1931, when they left defendant's employ.

During the course of their employment, plaintiff's treatment-ly worked overtime, had vacations with pay, were compensated for days off because of illness and other causes, and no record of their time was kept on an hourly basis. When plaintiff's worked overtime on after business hours, they frequently came to work late on the following day.

In November and December, 1931, plaintiff's were furnished with a copy of their record of earnings, from their respective dates for part of the previous year, and were then informed that the balance from time to time until the purchase price had been fully paid.

It also appears of record that plaintiff's maintained their accounts with the bank, and that they were employed by defendant, in May, 1930, most of the time that they were employed by defendant. In May, 1930, plaintiff's engaged the services of an attorney named Brundson and requested him to sue on a written contract whereby the defendant of plaintiff's and of each of them by the defendant company. At that time defendant was considering a proposal to amalgamate his business with another law practicing concern. The document prepared by Brundson was submitted to Hart just prior to the annual stockholders meeting of the defendant in September, 1930, but Hart refused to sign it and the contract was never executed by any of the parties.

The court reviewed all claims for overtime and no assignment of error is made on this ruling. The judgment of the trial court is affirmed as to the balance of the claim for wages and the court is affirmed for the entire amount of wages.

that each remained in the employ of the defendant, giving credit for the weekly salaries paid them during the 119 and 121 weeks respectively that they served defendant. It is not entirely clear whether these judgments are based upon the theory of an express contract or upon a quantum meruit. It appears from the record, however, that counsel for plaintiffs stated to the court during the process of the trial, that they were proceeding on the theory of a contract, and the gravamen of plaintiffs' testimony in both instances is that Hart engaged them upon an express oral agreement to pay \$65.00 per week to Miss Dupre and \$75.00 to Miss Benvenuti.

The fourth amended statement of claim, filed as late as May 29, 1931, alleges that plaintiffs' claim is for money earned as wages while employed by defendant during the period in question, for services rendered defendant at its special instance and request. Plaintiffs now assert by their briefs that they had an express oral contract with defendant and insist that they established the terms of this contract by the manifest weight of evidence, but they say that even though they may not be able to maintain their claim based upon an express oral contract, nevertheless the judgments are amply sustained by evidence of the reasonable value of their services. We cannot agree with this proposition, however, for two reasons: (1) where plaintiffs rely upon an express contract, as they evidently do in this proceeding according to the statement of counsel and the concession made by plaintiffs' brief, evidence of the reasonable value of their services is immaterial; it was so held in Wilson v. Wilson, 125 Ill. App. 385, and Hart v. Broadway, 201 Ill. App. 82; and (2) a quantum meruit recovery must be based upon actual working time and the burden of establishing the claim rests upon plaintiff and cannot be thrown upon defendant. Byckoff v. Taylor, 13 N. Y.

that each remained in the employ of the defendant, giving credit for the weekly salaries paid them during the 118 and 121 weeks respectively that they received statement. It is not entirely clear whether these judgments are based upon the theory of an express contract or upon a contract implied. It appears from the record, however, that counsel for plaintiffs rested to the court during the process of the trial, that they were proceeding on the theory of a contract, and the payment of plaintiffs' testimony in both instances is that that engaged them upon an express oral agreement to pay \$25.00 per week to Miss Dwyer and \$75.00 to Miss Benveniste.

The fourth amended statement of claim, filed as late as May 28, 1921, alleges that plaintiffs' claim is for money earned as wages while employed by defendant during the period in question, for services rendered defendant at its special instance and request. Plaintiffs now assert by their briefs that they had an express oral contract with defendant and insist that they established the terms of this contract by the weight of evidence, but they say that even though they say so, it is not so because their claim rests upon an express oral contract, nevertheless the judgments are only sustained by evidence of the reasonable value of their services. We cannot agree with this proposition, however, for two reasons: (1) where plaintiffs rely upon an express contract, as they evidently do in this proceeding according to the statement of counsel and the concession made by plaintiffs' brief, evidence of the reasonable value of their services is immaterial; it was so held in Wright v. Wright, 102 Ill. App. 186, and Wright v. Wright, 201 Ill. App. 221; and (2) a contract which rests upon an oral agreement is not enforceable and the burden of establishing the claim rests upon plaintiffs and cannot be thrown upon defendant. Wright v. Wright, 102 Ill. App. 186.

App. Div. 340. The record in this proceeding fails to disclose the exact time which plaintiffs actually worked, and there is no competent evidence to sustain this judgment upon the theory of a quantum meruit. From all the facts and circumstances in evidence, based upon a careful examination of the record, it clearly appears that both plaintiffs were employed on a weekly salary basis and that no pretense was made at any time to base the rate of their compensation upon any other consideration.

The question at issue, therefore, resolves itself into a consideration of whether plaintiffs established an express contract by which they were to receive \$85.00 and \$75.00 per week respectively during the entire period of their employment, and whether they are entitled to receive the salary shortage representing the difference between the amounts actually received by them and the alleged stipulated salaries agreed upon. As we view the case, the trial court was not justified in entering a judgment based upon an express contract. Various considerations enter into this conclusion. Plaintiffs received their weekly stipends by check each week, together with raises voluntarily paid to them by defendant from time to time during the entire period of employment. No protest was made by either plaintiff as to the amount paid and the checks received by them were regularly cashed and the proceeds thereof retained. A careful examination of the evidence shows that Miss Dupre, herself, was not certain as to the alleged oral agreement made with Hart. In one instance she testified that she was to begin at \$40.00 a week and later she stated with equal certainty that the sum was \$60.00 per week. Miss Benvenuti testified that in October, 1939, Hart stated that he had offered her much more than he could afford at the time and asked her to state the least that she and Miss Dupre would accept at the beginning, to which she replied that Miss Dupre would have to

App. Div. 2d. The record in this proceeding fails to disclose the exact time which plaintiff actually worked, and there is no con-

trary evidence to sustain this judgment upon the theory of a quantum meruit. From all the facts and circumstances in evidence, based upon a careful examination of the record, it clearly appears

that both plaintiffs were employed on a weekly salary basis and that no payment was made at any time to base the rate of their compensation upon any other consideration.

The question of quantum meruit, therefore, remains itself a question of fact. The evidence in this case is not sufficient to sustain the judgment of the court in this regard.

during the entire period of their employment, and whether they are entitled to receive the salary shortage representing the difference between the amount actually received by them and the amount stip-

ulated salaries agreed upon. As we view the case, the trial court was not justified in entering a judgment based upon an express con-

tract. Plaintiff's complaint sets out the consideration, and after reciting that they were employed by defendant, together with various other facts, they pray for relief.

either plaintiff as to the amount paid and the checks received by them were regularly cashed and the proceeds thereof retained. A

written statement of the witness shows that Mrs. Brown, plaintiff, was not satisfied as to the alleged oral agreement with defendant. In one instance she testified that she was to begin at \$40.00 a week and later she stated with equal certainty that the sum was \$30.00

per week. Mrs. Brown testified that in January, 1930, they agreed that he had offered her much more than he could afford at the time and asked her to leave the house that she and Miss Joyce would occupy at the residence, so that the plaintiff and Mrs. Brown would have to

have \$40.00 and she, Miss Benvenuti, \$45.00. In December, 1930, plaintiffs were notified of a reduction in salary of \$15.00 per week. Thereafter for about four weeks until the termination of their employment they continued to accept the lesser amount. At about this time, Miss Benvenuti tendered her resignation to defendant, stating her reasons therefor, but making no reference whatever to any balance due her for salary, back pay or overtime. This letter was written at a time when, according to plaintiff's statement of claim, she considered defendant indebted to her for over \$4,000. Another circumstance tending to rebut the existence of an express agreement, under which there was a continuing shortage of salary, arises in connection with the purchase of stock by both plaintiffs. If they really believed that part of their salary was being withheld from the beginning, and that defendant was indebted to them for a portion thereof during each week of their employment up to the time that they purchased defendant's stock, it is indeed strange that they made the installment payments in cash instead of at some time or other requesting defendant to apply the back salary alleged to be due them on the unpaid purchase price of the stock. Still another circumstance is the fact that Miss Wilkins was bookkeeper for the company, roommate of both plaintiffs and very friendly to them. It does not appear from the books kept by Miss Wilkins, or from financial statements of the company that any of these alleged salary shortages were carried on the books of the company as a liability. Moreover, both plaintiffs attended stockholders meetings accompanied by their attorneys apparently at a time when they were giving some thought toward reducing the agreement to writing, but these unpaid wages were never mentioned by them at any meeting of the company, nor was any protest made as to the financial statements of the company which failed to include these items among its liabilities.

have \$50.00 and she, Miss Haverhill, \$45.00, in December, 1933.
plaintiffs were notified of a settlement of \$25.00 per week.
Thereafter for about four weeks until the termination of their em-
ployment they continued to receive the lesser amount. At about this
time, Miss Haverhill tendered her resignation to defendant, stating
that because defendant was making no provision whatever for any delay
due her for salary, each pay on overtime. This factor was evident
at a time when, according to plaintiff's statement of claim, she
considered defendant indebted to her for such delay. In fact,
circumstances tending to rebut the statement of an express agreement,
under which there was a continuing advance of salary, arose in
connection with the advance of stock by both plaintiffs. If they
truly believed that part of their salary was being withheld from
the beginning, and that defendant was indebted to them for a portion
thereof during each week of their employment up to the time that
they received defendant's check, it is hardly strange that they made
the installment payments in each instead of at some time or other
requesting defendant to apply the back salary alleged to be due them
on the unpaid purchase price of the stock. Will another circum-
stance is the fact that Miss William was bookkeeper for the company,
roommate of both plaintiffs and very friendly to them. It does not
appear from the books kept by Miss William, or from financial state-
ments of the company that any of these alleged salary advances were
credited on the books of the company as a liability. However, both
plaintiffs alleged expenditures were accounted for in their
expense accounts at a time when they were filing same against
defendant. The question is critical, but these would appear
were never mentioned by them at any meeting of the company, nor was
any mention made as to the financial statement of the company which
failed to include these items among its liabilities.

The decisions in this state are numerous and the law is fairly well settled that the acceptance of regular salaries during a period of employment without protest during any of the period or at final settlement is a circumstance entirely inconsistent with a claim for back wages, and should be looked upon with suspicion. It was so held in Robinson v. Weber, 23 Ill. App. 570, Lowe v. Marler, 4 Ill. App. 420, Mitchell v. City of Chicago, 358 Ill. App. 301, and Levi v. Reid, 91 Ill. App. 430. To be sure, the circumstances in these various cases are not precisely the same as in this proceeding, but are in many respects similar. The general principle to be deducted from the decisions is that it is not reasonable to believe the existence of such an agreement as is here contended for where frequent settlements are had during a long course of employment without protest. Such conduct is not in accordance with the rational conduct of persons and is inconsistent with their claims made long after the alleged agreement is supposed to have been made. The circumstance of this case indicate that there were many occasions when plaintiffs might have registered their protest in no uncertain terms against defendant's failure to pay these salary shortages, and to assert their claim in some manner consistent with the position that they assumed upon the trial of this cause. The fact is fairly evident all through this record that no such protest or complaint was made, and the acceptance of weekly salary checks during the period of more than two years, under all the circumstances of the case, is in our opinion fatal to plaintiffs' position.

For the reasons stated, the judgment of the trial court will be reversed with findings of fact here.

REVERSED WITH FINDINGS OF FACT.

HEBEL, P. J. AND WILSON, J. CONCUR.

FINDINGS OF FACT.

We find as a matter of fact that plaintiffs had no express agreement with defendant for the payment to them of \$80.00 and \$85.00 per week respectively; that the terms of their employment were left uncertain and indefinite and largely within defendant's discretion; that they received each week the full amount of their salary during the entire period of their employment by defendant; that there is no competent evidence upon which a judgment could be entered in their favor on a quantum meruit; and that there is no liability on the part of defendant to plaintiffs for any sum whatsoever.

EXHIBIT 10

We find as a matter of fact that plaintiff had no

express agreement with defendant for the payment to them of \$50.00 and \$68.00 per week respectively; that the terms of their employment were left uncertain and indefinite and largely within

defendant's discretion; that their recovery was not the full amount of their salary during the entire period of their employment by defendant; that there is no competent evidence upon which a

judgment could be rendered in their favor as a contract matter; and that there is no liability on the part of defendant to plaintiff for any sum whatsoever.

35664

ANGELA BENVENUTI,
(Plaintiff) Appellee,

v.

CHICAGO LAW PRINTING COMPANY,
a Corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 601⁴

Opinion filed June 15, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This cause was consolidated upon appeal with case No. 35663. The facts and issues involved in both proceedings are substantially the same and our conclusions in this proceeding are governed by the opinion filed in case No. 35663.

The judgment of the Municipal Court will be reversed with findings of fact here.

REVERSED.

HEBEL, P.J. AND WILSON, J. CONCUR.

FINDINGS OF FACT

We find as a matter of fact that plaintiff herein had no express agreement with defendant for the payment to her of \$65.00 per week during the entire period of her employment by defendant; that there is no competent evidence on which a judgment in quantum meruit may rest; that plaintiff has been paid her full compensation for services rendered to defendant and that defendant is not liable to plaintiff in any sum whatsoever.

10004

AMERICAN UNIVERSITY

(WASHINGTON, D.C.)

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WASHINGTON, D.C.

(Telephone) 44-2100

AMERICAN UNIVERSITY

WASHINGTON, D.C.

10004

Opinion filed June 15, 1933

RE. JAMES EARL RAYMOND, JR. (Appellant) vs. THE UNITED STATES (Respondent).

This case was originally heard upon appeal with case No. 10004. The facts and issues involved in both proceedings are substantially the same and our conclusions in this proceeding are governed by the opinion filed in case No. 10004.

The judgment of the Municipal Court will be reversed with findings of fact here.

REVEREND.

WILLIAM F. WILSON, JR., ATTORNEY

STATEMENT OF FACTS

We find as a matter of fact that plaintiff herein had no express agreement with defendant for the payment to her of \$65.00 per week during the entire period of her employment by defendant; that there is no competent evidence on which a judgment in favor of plaintiff may rest; that plaintiff has been paid her full compensation for services rendered to defendant and that defendant is not liable to plaintiff in any sum whatsoever.

35665

CHARLES E. CHAMPLIN,

(Plaintiff) Appellee,

v.

CHICAGO LAW PRINTING COMPANY,
a Corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 601

Opinion filed June 15, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Charles E. Champlin, as plaintiff, recovered a judgment in the Municipal Court of Chicago against defendant in the sum of \$313.66, as commissions for printing secured by him for defendant.

The cause was tried before the court without a jury. Plaintiff's statement of claim consisted of nine items, the first eight of which represented claims alleged to be due for the salary shortage and overtime. Item No. 9 is for commissions alleged to be due under a verbal agreement with defendant. The court disallowed the first eight items, but entered judgment upon a portion of item No. 9.

Two principal grounds are assigned for reversal: (1) that the evidence clearly discloses that there was no agreement to pay commissions in addition to the weekly salary paid to plaintiff; and (2) that there was a bona fide dispute at the time of plaintiff's discharge, upon which a full settlement was made and accepted by plaintiff, which constituted an accord and satisfaction of plaintiff's claim.

The facts disclose that in September, 1928, Erick H. Hart organized the defendant company to engage in law printing and employed plaintiff as solicitor. From the beginning, plaintiff received a salary of \$50.00 per week until July 1, 1929, was then paid \$58.00 a week until October 1, 1929, \$61.00 a week from

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1. THE UNITED STATES OF AMERICA

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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1. The name was typed before the name of the father.

No. 6.

the first eight items, but entered judgment upon a finding of their due under a verbal agreement with defendant. The court disallowed shortage and overline. Item No. 9 is for commissions alleged to be eight of which represented claims alleged to be due for the salary Plaintiff's statement of claim consisted of nine items, the first

(f) : However not designed as ordinary legislative act

1945

The facts disclosed that in September, 1938, Taylor had organized the defendant company to engage in law printing and employed himself as solicitor. From the beginning, plaintiff received a salary of \$30.00 per week until July 1, 1939, was then

January 20th to April 1, 1930, and \$85.00 a week from October 1, 1930, until the termination of his employment in January, 1931.

Inasmuch as the court disallowed plaintiff's claim for salary shortage and overtime, and no error is assigned as to that ruling, it will be necessary to consider only the question of commissions covered by item No. 9 of plaintiff's fourth amended statement of claim, upon which the judgment is based.

Plaintiff contends that he was to be paid a commission upon certain printing accounts secured for defendant, and so testified. His testimony is corroborated by that of Mary Dupre, a former employee of defendant, who is plaintiff in a companion proceeding here pending, wherein she likewise instituted suit for salary shortage and overtime. Hart denies that he had any conversation or agreement with plaintiff relative to commissions. We have examined the record carefully, and while there appears to be a conflict as to this question of fact, it seems to us that plaintiff's salary was intended primarily to cover the solicitation of accounts, and that no arrangements for commissions, such as is here claimed, existed.

However, we are of the opinion that defendant's second contention, namely, there was an accord and satisfaction, is controlling of the issues involved. The facts upon which this question rests disclose that plaintiff claims not only salary shortage and a bonus, but commissions as well, and that a bona fide dispute existed between him and defendant as to the amount due him. This dispute arose in January, 1931. According to Hart, plaintiff then claimed shortage in salary and a bonus. Defendant denied both of these claims and told plaintiff that he would pay him, and at the same time, gave him notice of the termination of his employment. Defendant thereupon drew two checks, one No. 10554, upon the back of which was endorsed

January 20th to April 1, 1930, and \$25.00 a week from October 1, 1930, until the termination of his employment in January, 1931. It is shown as the court allowed Plaintiff's claim for salary shortage and overtime, and no error is assigned as to that ruling, it will be necessary to consider only the question of commissions covered by item No. 3 of Plaintiff's fourth amended statement of claim, upon which the judgment is based.

Plaintiff contends that he was to be paid a commission upon certain selling contracts secured by the defendant, and as testified, his testimony is corroborated by that of Mary Quinn, a former employee of defendant, who is identified as a co-defendant proceeding here pending, wherein she likewise instituted suit for salary shortage and overtime. That denies that he had any conversation or agreement with defendant relative to commissions. He has testified the terms of his employment, and while these appear to be a conflict as to this question of fact, it seems to us that Plaintiff's salary was intended primarily to cover the collection of accounts, and that no arrangements for commissions, such as he here claimed, existed.

However, we are of the opinion that defendant's second contention, namely, there was no record and satisfaction, in connection of the claims involved. The facts upon which this question rests disclose that Plaintiff claims that salary shortage and a bonus, but defendant as well, and that a bona fide dispute existed between him and defendant as to the amount due him. This dispute arose in January, 1931. According to Mary, Plaintiff then claimed shortage in salary and a bonus. Defendant denied both of these claims and told Plaintiff that he would pay him, and at the same time, gave him notice of the termination of his employment. Defendant thereupon

the words "Balance of salary in full to date, Chicago Law Printing Company," and check No. 10555, upon the back of which was endorsed the words "Bonus in full to date, Chicago Law Printing Company". Defendant accepted both of these checks, took them to his lawyer who affixed a qualified endorsement thereon stating that check No. 10554 was "accepted only on account of salary" and that check No. 10555 was "accepted only on account of wages." Defendant affixed his signature to both checks by way of endorsement, cashed them and retained the proceeds. He believes that under the well settled rule in Illinois and elsewhere, this constituted an accord and satisfaction. The authorities hold that where there is a bona fide dispute as to how much is due, a payment of the amount claimed by the debtor to be in full settlement, if accepted by the creditor, is a satisfaction of the claim, and it makes no difference that the creditor protests, if he accepts the payment. Under such circumstances, the creditor must either accept what is offered with the condition upon which it is offered, or refuse it. A qualified endorsement made without the knowledge or authority of the debtor does not alter the situation. In re Estate of Cunningham, 311 Ill. 311 Janel v. Geny, 287 Ill. 359, Snow v. Griesheimer, 320 Ill. 106, Oatlander v. Scott, 161 Ill. 339.

Some contention is here made that plaintiff's qualified endorsement was an acceptance in full of only bonus and salary short ages, but not of the amount claimed by plaintiff for commissions. We see no merit in this contention, however. Plaintiff and defendant had some difficulty in January, 1931, when plaintiff's employment terminated, and according to the evidence, as well as the documentary proof contained on the back of the two checks given plaintiff, payments were made in settlement of all disputed claims, and under the authorities constituted an accord and satisfaction.

For the reasons stated, the judgment of the Municipal Court will be reversed.

HEBEL, P.J. AND WILSON, J. CONCUR.

REVERSED.

the words "Balance of salary in full to date, Chicago Law Printing Company," and check No. 10882, upon the back of which was endorsed the words "Amount in full to date, Chicago Law Printing Company".

Defendant accepted both of these checks, took them to his lawyer who attested a qualified endorsement thereon stating that check No. 10882 was "accepted only on account of salary" and that check No. 10883 was "accepted only on account of wages." Defendant attested his signature to both checks by way of endorsement, cashed them and retained the proceeds. He believes that under the will created this in Illinois and elsewhere, this constituted an accord and satisfaction. The authorities here and there is a point that this was as to how much is due, a payment of the amount claimed by the debtor to be in full settlement, it accepted by the creditor, is a satisfaction of the claim, and it makes no difference that the creditor afterwards, it he accepts the payment. Under such circumstances, the creditor must either accept what is offered with the condition upon which it is offered, or refuse it. A qualified endorsement made without the knowledge or consent of the creditor does not affect the situation. In the State of Maryland, WILLIAMS v. WILLIAMS, 111 Md. 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

35418

ELLA RASMUSSEN,

Appellee,

v.

THE BOSTON STORE, a
corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

267 I.A. 602

Opinion filed June 15, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, Ella Rasmussen, brought her action against The Boston Store, a corporation, and E. S. McGuire, a police officer, for false arrest, false imprisonment and malicious prosecution. A verdict of the jury was returned finding the Boston Store guilty, assessing plaintiff's damages at the sum of \$25,000 and finding McGuire not guilty. A motion for a new trial by the defendant, The Boston Store was overruled and judgment entered on the verdict from which this appeal was prayed and allowed. The defendant McGuire is no longer in the case.

It appears from the facts that the defendant, The Boston Store, was a large department store located in the City of Chicago and employed a number of clerks and assistants. It had a contract with a private detective agency by the name of McGuire & White, under which McGuire & White agreed to protect the defendant against shoplifters and thieves and to furnish detectives for that purpose. The defendant paid to McGuire & White so much per day for each detective so furnished, but McGuire & White retained control and superintendence over these detectives and had the sole power to employ and discharge them. McGuire & White agreed to indemnify the defendant for any damages that might be recovered against it by reason of any acts done by their employees. Among the detectives and operatives employed by the detective agency and stationed at the defendants store were Marie Barber and George Wiedder. Each

2012

WILLIAM HARRINGTON

Applicant

THE HONORABLE

GOVERNMENT

Applicant

WILLIAM HARRINGTON

Applicant

WILLIAM HARRINGTON

2012

Opinion filed June 12, 1932

MR. JUSTICE CLARK delivered the opinion of the court.
HARRINGTON, WILLIAM HARRINGTON, brought her action against
The Boston Store, a corporation, and E. A. Harrington, a police officer,
for false arrest, false imprisonment and malicious prosecution. A
verdict of the jury was returned finding the Boston Store guilty,
necessarily plaintiff's damages at the sum of \$100,000 and finding
Harrington not guilty. A motion for a new trial of the defendant, The
Boston Store was overruled and judgment entered on the verdict from
which this appeal was taken and allowed. The defendant moves for
no longer in the case.

It appears from the facts that the defendant, The
Boston Store, was a large department store located in the City of
Chicago and employed a number of clerks and assistants. It had a
contract with a private detective agency at the name of HARRINGTON &
WIFE, under which HARRINGTON & WIFE agreed to conduct the business
against shoplifters and thieves and to furnish reports for the
purpose. The defendant paid to HARRINGTON & WIFE a sum of money per day for
such detective as furnished for HARRINGTON & WIFE a list of names and
all communication over these individuals and had the sole power
to employ and discharge them. HARRINGTON & WIFE agreed to indemnify
the defendant for any damages that might be recovered against it by
reason of any acts done by their employees. Among the detectives
and operatives employed by the detective agency and residing at
the defendant's office were HARRINGTON and WIFE.

of these produced a certificate of appointment from the department of police of the city of Chicago, designating them as special patrolmen. They received no pay from the city and performed no services other than such as were designated by McGuire & White. A special room was provided by the defendant for the use of the operatives furnished by McGuire & White and it was in this room that shoplifters and thieves were examined when first taken into custody.

According to the testimony of the plaintiff she was a public accountant and had been at the store the night before her arrest and had made some purchases which she wanted to have wrapped for mailing, and as it was late she was asked to check them until the next morning. This she did and returned early the next morning. When she entered the store on the following morning she had in her possession two hand bags; one which she carried regularly and another which she had purchased some days before at Mandel's. She was on her way to the check room for her packages when she was stopped by a woman and forced to an elevator and taken to a room on the sixth floor. The woman who forced her to go to the sixth floor was the private detective, Marie Baroeur. When she reached the room on the sixth floor she was charged with having stolen the pocket book or hand bag and was searched by Wiedder. The manager of the defendant company, Hart, came into the room and wanted her to sign a release and stated that if she did so, she would be permitted to leave. This she refused to do and she was detained until late in the afternoon. She was then taken in a patrol wagon to the police station where she was placed in custody without a warrant and detained until the following day. A complaint was then signed, December 14, 1929, by one E. S. McGuire, a regular police officer of the city of Chicago charging the plaintiff with the theft of one purse. This E. S. McGuire, who was made a defendant to the original

of them produced a certificate of appointment from the department

of police of the city of Chicago, designating them as special

patrolmen. They received no pay from the city and performed no

services other than such as were designated by Detective A. White. A

special room was provided by the defendant for the use of the

operatives furnished by Detective A. White and it was in this room that

shoplifters and thieves were examined when first taken into custody.

According to the testimony of the plaintiff she was

a public accompaniment and had been at the store the night before but

did not and had made some purchases which she wanted to have wrapped

for mailing, and as it was late she was asked to check them until

the next morning. This she did and returned early the next morning.

When she entered the store on the following morning she had in her

possession two hand bags; one which she carried regularly and

another which she had purchased some days before at Randall's. She

was on her way to the check room for her packages when she was stopped

by a woman and asked to go elsewhere and leave by a room on the

third floor. The woman who turned her to go to the third floor was

the private detective, Louis Brownell. When she reached the room

on the third floor she was stopped and asked to show the contents

both of hand bag and was searched by witness. The manager of the

department company, Miss Jane, who was in the room and seeing her go also

a release and stated that it was all right, and would be permitted to

leave. This she refused to do and she was detained until late in

the afternoon. She was then taken in a patrol wagon to the police

station where she was placed in custody without a warrant and

detained until the following day. A complaint was then signed,

December 14, 1934, by one E. J. McCarthy, a regular police officer

of the city of Chicago charging the plaintiff with the theft of one

proceeding, was a brother of the McGuire of McGuire & White, but was not connected with that concern in a business way. He appears to have been connected with the so-called "State Street Squad", and was called in by the various stores after arrests had been made by the special officers.

It appears to have been the theory of the defendant, The Boston Store, that the fact that the complaint was signed by a regular police officer, would absolve it, The Boston Store, from liability.

Marie Barbear, on behalf of the defendant, testified that she observed the plaintiff near the pocket book counter. Her attention was called to the plaintiff because she, the plaintiff, was tearing a tag from a purse; that at the same time she was trying to hide it behind another purse she was carrying; her actions were suspicious; plaintiff walked toward the Dearborn Street entrance and was just going to go through the door when the witness testified she seized her.

At the hearing at the police court witnesses from Wendel Brothers testified they handled the same kind of pocket books as the one which plaintiff had and which she claimed she had purchased at that store. Defendant also introduced testimony to the effect that similar pocket books were sold by it. The testimony on both sides was voluminous and, in view of the fact that this cause will have to be tried again, it will answer no good purpose to set it forth in great detail. It is sufficient to say that in our opinion the evidence adduced on behalf of the plaintiff was ample to require the submission of the cause to the jury.

Upon the hearing of the issues in the Municipal Court before the Honorable William A. Fetzner, a judge of that court, a

proceeding, was a brother of the McGuire of McGuire & White, but
was not connected with this case in a business way. It appears
to have been connected with the so-called "White Street Gang", and
was called in by the police when they arrested him and took him to
the municipal court.

It appears to have been the theory of the defendant,
The Boston Store, that the fact that the complaint was signed by a
police officer, would involve it. The witness stated, however,
that it was not.

Marie Winters, on behalf of the defendant, testified
that she observed the plaintiff leave the house last evening. Her
attention was called to the plaintiff because she, the plaintiff,
was carrying a bag from a purse; that at the same time she was trying
to hide it behind her back when she was driving; her witness was
convinced; plaintiff asked her to come to the witness stand, and
was just going to go through the door when the witness testified
she called her.

As the hearing at the police court witness from
Mabel Winters testified they handled the same kind of pocket books
as the one which plaintiff had and which she claimed she had purchased
at that store. Defendant also introduced testimony to the effect
that similar pocket books were sold by it. The testimony on both
sides was voluminous and, in view of the fact that this case will
have to be tried again, it will answer no good purpose to set it
forth in great detail. It is sufficient to say that in our opinion
the evidence adduced on behalf of the plaintiff was ample to require
the submission of the case to the jury.

Upon the hearing of the issues in the Municipal Court
before the Honorable William A. Foster, a judge of that court, a

finding was had by the court against the defendant, plaintiff here. It was found by the court that the defendant was guilty of larceny, as charged by the complaint, and sentence was entered upon her, directing that she be confined in the House of Correction for a term of 30 days. Upon an appeal to this court this finding was reversed, the cause remanded and the mandate filed in the Municipal Court. The cause being docketed in this court, the state's attorney confessed error in that it appeared that the Municipal Court had refused to grant the defendant a jury trial although repeatedly requested so to do. We are at a loss to understand upon what possible theory of the law the judge of the Municipal court could have proceeded to trial and entered a finding against the defendant, plaintiff herein, when she was clearly entitled to a hearing and trial by a jury. The proceeding can not be explained in our opinion on any legal ground and it was fitting that the state's attorney should have promptly confessed error as was done when the proceeding was reached in the Appellate Court on appeal. Under such circumstances the judgment of the Municipal Court was invalid and without effect. The court had jurisdiction of the subject-matter, but did not have the right to compel the defendant, plaintiff herein, to go to trial without a jury and without a jury waiver.

It is insisted on behalf of the defendant that this conviction of larceny in the Municipal Court is conclusive that the prosecution was upon probable cause. With this we are unable to agree. The judgment of the court was a nullity. People v. Kass, 242 Ill. App. 14. The court had no jurisdiction to try the plaintiff without proceeding in the manner prescribed by law. The constitutional provision that a defendant is entitled to a jury trial can not be so lightly disregarded as was done in this case. In other words,

finding was had by the court against the defendant, plaintiff here. It was found by the court that the defendant was guilty of larceny, as charged by the complaint, and sentence was entered upon her, directing that she be confined in the House of Correction for a term of 30 days. Upon an appeal to this court this finding was reversed, the cause remanded and the writs filed in the Municipal Court. The cause being docketed in this court, the state's attorney commenced error in that it appeared that the Municipal Court had refused to grant the defendant a jury trial although repeatedly requested to do so. We are at a loss to understand upon what possible theory of the law the judge of the Municipal Court could have proceeded to trial and entered a finding against the defendant, plaintiff herein, when she was clearly entitled to a hearing and trial by a jury. The proceeding can not be explained in our opinion on any legal ground and it was fitting that the state's attorney should have promptly confessed error as was done when the proceeding was reversed in the Appellate Court on appeal. Under such circumstances the judgment of the Municipal Court was invalid and without effect. The court had jurisdiction of the subject-matter, but did not have the right to compel the defendant, plaintiff herein, to go to trial without a jury and without a jury waiver.

It is insisted on behalf of the defendant that this conviction of larceny in the Municipal Court is conclusive that the prosecution was upon probable cause, with this we are unable to agree. The judgment of the court was a nullity. People v. Kane, 223 Ill. App. 2d. The court had no jurisdiction to try the plaintiff without proceeding in the manner prescribed by law. The conviction at proceeding that a defendant is entitled to a jury trial can not be collaterally disregarded as was done in this case. In other words,

there was no trial and what was done by the Municipal Court can not be considered as conclusive evidence of probable cause.

A considerable portion of defendant's brief is devoted to the proposition that Barbear and Biedder, the two operatives of the McGuire & White Detective Agency, were not servants of the defendant and therefore the defendant is not liable for their acts. It is also insisted that they were police officers of the City of Chicago and acting within the scope of their authority in the regular performance of their duties as such police officers. As to the first proposition it cannot be said that a contract between the McGuire & White Detective Agency and the defendant is, in our opinion, binding upon plaintiff in this proceeding. Moreover, the evidence shows that these operatives were furnished with a room located on the premises and, without doubt, the Boston Store would have the power, under their agreement with the McGuire & White Agency, to require the withdrawal of certain operatives and the substitution of others in the event they did not conduct themselves upon the premises in a proper and fitting manner. While the salaries were paid by the McGuire & White Detective Agency, nevertheless, indirectly the money that paid these operatives was paid by the Boston Store. Neither can we see any force in the argument that they were police officers of the City of Chicago, as they were not paid by the city nor does it appear that they were subject to the orders of the police department; they were hired by the McGuire & White Detective Agency and could be discharged at any time by that agency. The defendant can not and should not be allowed to hide behind this subterfuge. Both of these questions have been passed upon and considered before in the case of Memorowski v. Boston Store of Chicago, 363 Ill. App. 88. The facts with reference to these two particular questions are almost identical with the facts considered in the case cited.

there was no trial and what was done by the municipal court can not be considered as conclusive evidence of probable cause.

A considerable portion of defendant's trial is

devoted to the proposition that defendant and father, the two operatives of the McGuire & White Detective Agency, were not servants of the defendant and therefore the defendant is not liable for their acts. It is also insisted that they were police officers of the City of Chicago and acting within the scope of their authority in the regular performance of their duties as such police officers.

As to the first proposition it cannot be said that a contract between the McGuire & White Detective Agency and the defendant is, in our opinion, binding upon defendant in this proceeding. Moreover,

the evidence shows that these operatives were furnished with a room located on the premises and, without doubt, the Boston House would

give the power, under their agreement with the McGuire & White Agency, to regulate the attendance of certain operatives and the substitution of others in the event they did not conduct themselves as was provided in a paper and listing annexed to the contract.

were paid by the McGuire & White Detective Agency, nevertheless, initially the money that paid these operatives was paid by the Boston House. Neither can we see any force in the argument that

they were police officers of the City of Chicago, as they were not paid by the city nor does it appear that they were subject to the orders of the police department; they were hired by the McGuire

& White Detective Agency and would be discharged at any time by that agency. The defendant can not and should not be allowed

to hide behind this subterfuge. Both of these questions have been passed upon and considered before in the case of People v. [redacted].

People v. [redacted], 100 Ill. App. 32. The facts with reference to those two particular questions are almost identical with the

A considerable portion of defendant's brief is devoted to the remarks of the court during the progress of the trial which, it is claimed, were prejudicial and unwarranted and had considerable bearing upon the verdict rendered in the case. Upon the oral argument of the cause in this court, however, it developed that these remarks were not made in the presence of the jury and we have been asked to disregard that portion of the brief.

At the conclusion of the evidence and before the argument, instructions were offered on behalf of plaintiff and both defendants. The defendant, The Boston Store, requested the court to give 24 instructions on its behalf. The court stated to counsel that in his opinion 15 instructions were sufficient and handed them back and refused to mark the same "given" or "refused". None of said instructions offered on behalf of the defendant were given to the jury. We agree with the court that 15 instructions would have been sufficient to have covered the issues in this case.

Section 74 of the Practice Act, however, provides:

"§ 74. When instructions are asked which the judge can not give, he shall, on the margin thereof, write the word 'refused', and such as he approves he shall write on the margin thereof the word 'given' " " " .

This section has been passed upon and held constitutional in the case of The People v. Kelly, 347 Ill. 231. Courts have repeatedly condemned the practice of requesting a large number of instructions as it does not tend to help a jury in the consideration of the issues and places an extra burden upon the trial court. Some lawyers, however, still persist in so doing. Such conduct is not, as a rule, followed by attorneys for the plaintiff as it is to their particular interest to keep the record free from error. Counsel for defendants, however, are more concerned with the immediate result of the trial, that the future decision of the proceeding upon an appeal. We have been unable to find a case, however, holding that the court may

A considerable portion of defendant's trial is devoted to the recital of the events of the trial which, it is claimed, were prejudicial and unwarranted and had considerable bearing upon the verdict rendered in the case. Upon the oral argument of the cause in this court, however, it developed that these events were not material to the outcome of the trial and we have been asked to disregard that portion of the brief.

At the conclusion of the evidence and before the argument, instructions were offered on behalf of plaintiff and both defendants. The defendant, the woman store, requested the court to give 34 instructions on its behalf. The court stated its opinion that in his opinion it is instructions were relevant and material and each and refused to grant the same "given" or "refused". None of said instructions offered on behalf of the defendant were given to the jury. We agree with the court that its instructions would have been sufficient to have covered the issues in this case.

Section 74 of the Practice Act, however, provides: "If, upon instructions are asked which the judge can not give, he shall, on the margin thereof, write the word 'refused', and such an answer he shall write on the margin thereof the word 'given'."

This section has been construed upon and held constitutional in the case of The People v. Kelly, 247 Ill. 231. Courts have repeatedly sustained the practice of requesting a large number of instructions as it does not tend to help a jury in the consideration of the issues and place an extra burden upon the trial court. Some lawyers, however, still persist in so doing. Such conduct is not, as a rule, followed by attorneys for the plaintiff as it is to their particular interest to keep the record free from error. Counsel for defendants, however, are more concerned with the immediate result of the trial, that the future decision of the proceeding upon an appeal. We have

arbitrarily refuse to give instructions when handed up, even though numerous. The Supreme Court of this state in the case of Chicago City Ry. Co. v. Sandusky, 138 Ill. 400, held that it was improper to confine the giving of instructions to a limited number, although recognizing the propriety of the court in requesting counsel to keep down the number, as far as possible, so as to cover the actual issues involved. It was also pointed out in that case that the court should not wait until the conclusion of all the evidence in order to determine the number which would be sufficient. We are of the opinion, that under section 74 of the Practice Act, the court should not have arbitrarily refused to have given any of the instructions tendered in this proceeding, but should have considered them and selected those which tended to present the defendant's theory of the case and marked them "given" and marked the others "refused". Kepperly v. Ramsden, 83 Ill. 354. We are of the opinion that the court erred in refusing to give any of the instructions offered by the defendant.

The abstract filed in this proceeding has violated the rule of this court which provides that the evidence shall be set out in narrative form. It is replete with questions and answers of witnesses and objections thereto. The brief filed on behalf of the defendant contains 39 different points under different headings and sub-headings. The brief of the plaintiff attempts to make a statement of fact, but this statement consists purely of argument stretched out to great length.

We feel, as the trial court evidently did, that the instructions offered on behalf of the defendant could have easily been condensed within the number indicated by the court. We are of the opinion, however, that under the section of the Practice Act already referred to, it became the duty and obligation of the court to have considered the instructions and given those which the court considered

arbitrarily refuse to give instructions when asked to, even though
numerous. The Supreme Court of this state in the case of Chicago
City v. De. v. Sandusky, 128 Ill. 400, held that it was improper
to require the giving of instructions to a limited number, although
recognizing the propriety of the court in possessing counsel to have
down the number, as far as possible, as to whom the actual issues
involved. It was also pointed out in that case that the court should
not wait until the conclusion of all the evidence in order to deter-
mine the number which would be sufficient. We are of the opinion, the
that under section 74 of the Practice Act, the court should not have
arbitrarily refused to have given any of the instructions requested in
this proceeding, but should have considered them and selected those
which tended to present the defendant's theory of the case and
which were "given" and asked the other "refused". Chicago v.
Hampton, 128 Ill. 394. We are of the opinion that the court erred
in refusing to give any of the instructions offered by the defendant.
The abstract filed in this proceeding has violated
the rule of this court which provides that the evidence shall be set
out in narrative form. It is replete with questions and answers of
witnesses and objections thereto. The brief filed on behalf of the
defendant contains 23 different points under different headings and
sub-headings. The brief of the plaintiff attempts to make a statement
of facts, but this statement consists purely of argument stretched
out to great length.
We feel, as the trial court evidently did, that the
instructions offered on behalf of the defendant would have easily been
condensed within the number indicated by the court. We are of the
opinion, however, that under the section of the Practice Act already
referred to, it became the duty and obligation of the court to have

necessary and marked them in accordance with the statutory provision. It was error to refuse them in toto, especially as it appears that counsel for defendant was not given further time to prepare them in conformity with the views expressed by the court.

For the reasons stated in this opinion, the judgment of the Superior Court is reversed and the cause is remanded, for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

recovery and the emergence of self-help and recovery

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains. The data are the mean values of three independent experiments. Error bars represent standard deviation.

only a single review for new candidates for license and a review of

It appears that in addition with the above mentioned by the report.

For the purpose stated in this column, the July-

ment of the Superior Court is reversed and the cause is remanded.

1917-18

STANDARD FORMS OF THE SECRETARY

35478

SANKEY B. WASHINGTON, et al,
(Complainants) Appellants,

v.

LUCY C. JEFFERSON,
(Defendant) Appellee.

72
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

267 I.A. 602²

Opinion filed June 15, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

Complainants' amended and supplemental bill of complaint charges that on the 16th day of June 1925, complainants entered into an agreement with the defendant, Lucy C. Jefferson, for the purchase of certain real estate in the City of Chicago; that the purchase price was \$12,000, of which \$1,500 was to be in cash, the assumption of a mortgage in the sum of \$3,500 and the balance payable at the rate of \$75 per month, together with interest at the rate of 7 percent per annum; that numerous payments were made under said agreement, but not promptly; that the complainants had made several improvements, the same being a store and smaller kitchenette apartments and plumbing, thereby increasing the value of the property; that subsequently complainants defaulted in their payments and a suit for possession of the premises started in the Municipal Court and judgment entered thereon; that after the entry of said judgment, on divers times and occasions, the defendant here accepted various payments upon said agreement, but refused to give receipts for the same and entered into negotiations for settlement of the difference between the parties, as a result of which an agreement was entered into between the parties and the forfeiture waived; that subsequently after said agreement had been entered into and payment accepted, the defendant ordered and caused to be placed

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Opinion filed June 15, 1933

MR. JUSTICE BRIDGES delivered the opinion of the court.

Complainant, answered and supplemented bill of complaint against defendant on the 14th day of June 1933, wherein complainant stated that he executed with the defendant, Jack E. Johnson, for the purchase of certain real estate in the City of Chicago; that the purchase price was \$12,000, of which \$1,500 was to be in cash, the assumption of a mortgage in the sum of \$5,500 and the balance payable at the rate of 5% per month, together with interest at the rate of 5 percent per annum; that numerous payments were made under said agreement, but not promptly; that the complainant had made several improvements, the same being a store and smaller kitchenette apartments and building, thereby increasing the value of the property; that subsequently complainant defaulted in their payments and a suit for possession of the premises stated in the complaint was brought and judgment rendered against him after the entry of said judgment, or divers times and occasions, the defendant here requested various payments upon said agreement, but refused to give receipts for the same and refused to deposit the same for settlement of the difference between the unpaid, as a result of which an agreement was entered into between the parties and the forfeiture suit; that subsequently after said agreement had been entered into and payments accepted, the defendant ordered and caused to be placed

in the hands of the bailiff a writ of restitution growing out of said judgment in the Municipal Court; that the complainants are ready and willing to pay whatever sum is due, but are unable to ascertain what amount is due without the assistance of the defendant; that the complainants are ready and willing to pay in court whatever the court finds is due and owing and prays for an injunction restraining the defendant from proceeding further on the judgment in the Municipal Court, that the forfeiture may be declared canceled and held for naught, and for an accounting; prays for such other and further relief as the court may find necessary.

January 10, 1931, a temporary injunction issued as prayed for and a bond filed. Subsequently, defendant filed a petition in support of a motion to dissolve the injunction which was allowed on the ground that the bond was insufficient and leave was granted complainants to file a new and good bond.

April 18, 1931, upon failure of the complainants to file the proper bond an order was entered dissolving the temporary injunction and the cause was dismissed for want of equity. From this order complainants appeal. The order dissolving the injunction for failure to file the bond was proper, but the court was in error in dismissing the bill for want of equity. An answer was on file and no evidence was heard.

It is insisted that the facts set forth in the bill did not warrant relief, but with this we are not concerned. The proper way to have raised this question would have been by a demurrer to the bill. The court had jurisdiction of the subject-matter and while the bill may have been imperfect and indefinite, nevertheless, so long as an answer was on file, the court was without power to dismiss the bill without a hearing. Etchelberger v. Robinson,

in the hands of the plaintiff a bill of restitution growing out of said judgment in the Municipal Court; that the complainants are ready and willing to pay whatever sum is due, but are unable to ascertain what amount is due without the assistance of the defendant; that the complainants are ready and willing to pay in court whatever the court finds to be due and owing and prays for an injunction restraining the defendant from proceeding further on the judgment in the Municipal Court, that the defendant may be declared canceled and held for payment, and for an accounting; prays for such other and further relief as the court may find necessary.

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It is insisted that the facts set forth in the bill did not warrant relief, but with this we are not concerned. The proper way to have raised this question would have been by a demurrer to the bill. The court had jurisdiction of the subject-matter and while the bill may have been imperfect and indefinite, nevertheless so long as an answer was on file, the court was without power to dismiss the bill without a hearing. Richardson v. Richardson.

233 Ill. App. 579.

For the reasons stated in this opinion the judgment of the Superior Court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

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35487

THEO. MIELKE,

(Plaintiff) Appellee,

v.

RAYMOND MEYER,

(Defendant) Appellant.

23
APPEAL FROM

7
MUNICIPAL COURT

OF CHICAGO.

267 I.A. 602

Opinion filed June 15, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought his action in the Municipal Court to recover damages sustained by reason of a collision of his automobile and that of the defendant on August 9, 1930, at the intersection of Milwaukee avenue and Dempster road, two intersecting highways in Cook, County, Illinois.

The cause was tried by the court without a jury and resulted in a finding in favor of the plaintiff and the damages were assessed at the sum of \$151.65 and judgment entered on the finding.

It has been pointed out on this appeal that there was no evidence in the record upon which the court could have entered his finding for the amount of \$151.65. We are of the opinion that the defendant is correct in this contention. We have examined the abstract and find no testimony whatsoever as to the amount of the damages sustained by the plaintiff by reason of the collision. Plaintiff testified that he had his car repaired and paid for it, but he does not state how much he paid nor is there any receipted bill for repairs in evidence. We have gone to the record to confirm the judgment, if possible, but the record is silent on this question.

(Plaintiff) vs. (Defendant)

(Plaintiff) vs. (Defendant)

267 I.A. 602

Opinion filed June 15, 1933

Plaintiff brought his action in the Municipal Court to recover damages sustained by reason of a collision at his automobile and that of the defendant on August 8, 1930, at the intersection of Milwaukee Avenue and Webster Road, two intersecting highways in Cook County, Illinois.

The case was tried by the court without a jury and resulted in a finding in favor of the plaintiff and the damages were assessed at the sum of \$151.66 and judgment entered on the finding.

It has been pointed out on this appeal that there was no evidence in the record upon which the court could have entered its finding for the amount of \$151.66. We are of the opinion that the defendant is correct in this contention. We have examined the report and find no testimony whatsoever as to the amount of the damages sustained by the plaintiff by reason of the collision. Plaintiff testified that he had his car repaired and paid for it, but he does not state how much he paid nor in what way he was reimbursed for the repairs. We have gone to the record to confirm the judgment, if possible, but the record is silent on this question.

In view of the fact that the cause has to be remanded for a new trial, we refrain from expressing any opinion as to the question of negligence.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, F.J. AND FRIEND, J. CONCUR.

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Received 15 November 2004; accepted 15 November 2004

35496

LYDIA GOODMAN,

(Plaintiff) Appellee,

v.

J. WITTLES,

(Defendant)

On Appeal of JACK WITTLES,

(Defendant) Appellant.

24
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 I.A. 802

Opinion filed June 15, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

On September 4, 1930, Lydia Goodman, garnisher in this proceeding, secured a judgment by confession on a lease for the amount of \$76.50 against "J. Wittles". Subsequently, the Ogden National Bank of Chicago was served as garnishee and filed its answer showing funds on hand sufficient to cover the judgment and costs. On October 4, 1930, one Jack Wittles procured leave of court to become a party to said proceeding as an intervening petitioner and filed his petition setting forth that he was never indebted to the plaintiff and that the bank account garnisheed by the plaintiff belonged solely to him. The bank account shows that on October 26, 1929, the sum of \$1061.00 was withdrawn by J. Wittles and the account closed, and that the same amount was at the same time deposited in the same bank in the name of Jack Wittles, the son. From the evidence it appears that the son had never before had a bank account. He testified that he lived with his father, and had earned the sum of \$1061.00, although he was a minor during the period of time during which he claimed to have earned the money. The previous rent accounts were paid with the son's check out of this fund on deposit.

Page

LYDIA DOUGLAS

(Plaintiff) vs.

J. WITTEB

(Defendant)

ON APPEAL OF JURY VERDICT

(Defendant) vs.

WITTEB

WITTEB

WITTEB

208 I.A. 002

Opinion filed June 18, 1938

1. JUDICIAL COUNCIL REVERSED THE DECISION OF THE COURT

In December 4, 1937, Lydia Douglas, married in

this proceeding, secured a judgment by confession on a lease for

the amount of \$75.00 against "J. Witteb". Subsequently, the

United National Bank of Chicago was served as garnishee and filed

its answer showing funds on hand sufficient to cover the judgment

and costs. On October 4, 1938, one Jack Witteb procured leave

of court to become a party to said proceeding as an intervening

petitioner and filed his petition setting forth that he was never

indebted to the plaintiff and that the bank account garnished by

the plaintiff belonged solely to him. The bank account shows that

on October 26, 1938, the sum of \$1001.00 was withdrawn by J. Witteb

and the account closed, and that the same amount was at the same

time deposited in the same bank in the name of Jack Witteb, the

son. From the evidence it appears that the son had never before

had a bank account. He testified that he lived with his father,

and had earned the sum of \$1001.00, although he was a minor during

the period of time during which he claimed to have earned the money.

The previous year accounts were paid with the son's check out of

the bank on deposit.

The trial court heard the evidence and saw the witnesses and was evidently of the opinion that the money on deposit in the name of the son was, in fact, the money of the father. The facts and circumstances in evidence are sufficient to bear out the court's interpretation of the conduct of the parties in the transfer of the account from the father to the son, namely, that it was done to avoid the payment of debts. The general rule that a judgment creditor in a proceeding in garnishment acquires no greater rights against the garnishee than the judgment debtor has, and therefore can only recover such indebtedness as could be recovered by the debtor in an action of debt, or indebitatus assumpsit, is subject to exception in cases of fraud affecting the rights of judgment creditors. Crane v. Illinois Merchants Trust Co. 338 Ill. App. 257.

Where money or personal property of a debtor has been transferred by him for the purpose of defrauding creditors, the transferee may be held liable for the money or property so conveyed or its proceeds. Crane v. Illinois Merchants Trust Co., supra, and cases therein cited.

Where the property conveyed is personal property, it is not necessary to resort to a court of equity in order to have substantial justice.

Under the facts in this case we are of the opinion that the court properly found in favor of the plaintiff and, for the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

REBEL, P.J. AND FRIEND, J. CONCUR.

The trial court heard the evidence and saw the

witnesses and was evidently of the opinion that the money was

deposited in the name of the son was, in fact, the money of the father.

The facts and circumstances in evidence are sufficient to bear out

the court's interpretation of the conduct of the parties in the

transfer of the account from the father to the son, namely, that

it was done to avoid the payment of debts. The general rule that

a judgment creditor in a proceeding in fraudulent conveyances has

greater rights against the grantor than the judgment debtor has,

and therefore can only recover such indebtedness as could be recovered

by the debtor in an action of debt, or impeachment of judgment, is

subject to exception in cases of bona fide purchasers for value at

judgment creditors. Smith v. Williams, 100 N. H. 111.

100 N. H.

There money on personal property of a debtor has been

transferred by him for the purpose of defrauding creditors, the

creditor may be held liable for the money or property so conveyed

or its proceeds. Smith v. Williams, 100 N. H. 111.

cases therein cited.

Where the property conveyed is personal property, it is

not necessary to resort to a court of equity in order to have sub-

stantial justice.

Under the facts in this case we are of the opinion that

the court properly found in favor of the plaintiff and, for the

reasons stated in this opinion, the judgment of the plaintiff court

is affirmed.

JUDGMENT AFFIRMED.

HENRY, J. L. AND OTHERS, J. CONVENED.

35545

HERMAN H. NETTLER LUMBER CO.,
a corporation,

Appellant,

v.

CITY OF CHICAGO, a municipal
corporation,

Appellee.

25
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

267 I.A. 602

Opinion filed June 15, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The Herman H. Nettler Lumber Co., plaintiff, filed its declaration April 26, 1931, alleging that one Albert Kaddatz while in its employ was injured July 14, 1927, as a result of an accident arising out of and in the course of his employment by the plaintiff; that said Kaddatz was injured by reason of the negligence of the defendant, City of Chicago, a municipal corporation, while he, Kaddatz, was driving a wagon of the plaintiff over and along one of the streets of the defendant, City of Chicago. Plaintiff charges that on August 18, 1927, a statutory notice of said injury was served upon the City of Chicago according to law. By an amendment to the declaration it is further alleged by the plaintiff that the aggregate amount of compensation to be paid by plaintiff to its said employee Kaddatz was, on April 22, 1929, fixed and determined by the Industrial Commission and that thereafter on April 22, 1929, plaintiff paid to said employee the sum of \$2,956, which together with the payment previously made aggregated \$4,216, and that the plaintiff also paid for medical and hospital services.

The defendant filed its plea of the general issue and a special plea of the statute of limitations. A demurrer to the plea of the statute of limitations was overruled and the plaintiff electing to stand by its demurrer, judgment was entered against

HERMAN H. KESTER, Plaintiff,

vs.

CITY OF CHICAGO, a Municipal Corporation, Defendant.

Chicago, Illinois.

Opinion filed June 15, 1932

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2671.A.602

The defendant filed its plea of the general issue and a special plea of the statute of limitations. A demurrer to the plea of the statute of limitations was overruled and the plaintiff elected to stand by its demurrer. Judgment was entered against the defendant on April 22, 1930, plaintiff paid to said employee the sum of \$2,000, which together with the payment previously made amounted to \$4,000, and that the plaintiff also paid for medical and hospital services.

by an amendment to the declaration it is further alleged by the plaintiff that the aggregate amount of compensation to be paid by plaintiff to its said employee Kestner was, on April 22, 1930, fixed and determined by the Industrial Commission and that thereafter on April 22, 1930, plaintiff paid to said employee the sum of \$2,000, which together with the payment previously made amounted to \$4,000, and that the plaintiff also paid for medical and hospital services.

and along one of the streets of the defendant, City of Chicago.

while he, Kestner, was driving a wagon of the plaintiff over negligence of the defendant, City of Chicago, a municipal corporation, the plaintiff; that said Kestner was injured by reason of the accident arising out of and in the course of his employment by while in its employ was injured July 16, 1927, as a result of an its declaration April 22, 1931, alleging that one Albert Kestner The Herman H. Kestner lawsuit No., plaintiff filed

it, from which judgment this appeal has been taken and perfected in this court.

Chapter 70, paragraph 5, section 1, of Cahill's Illinois Revised Statutes of 1931, being an act concerning suits for personal injuries against cities, villages and towns, provides as follows:

"No suit or action at law shall be brought or commenced in any court within this State for damages against any incorporated city, village or town by any person for an injury to his person unless such suit or action be commenced within one year from the time such injury was received or the cause of action accrued."

Plaintiff contends that as both the plaintiff and the defendant are subject to the provisions of the Workmen's Compensation Act, that Kaddatz, an employee of the plaintiff, having been injured by reason of the negligence of the defendant, - his employer, the plaintiff in this case, becomes entitled to all the rights of its employee Kaddatz against the City of Chicago, the defendant, for injuries occasioned by the negligence of the defendant, after having paid in full the amount determined by the Industrial Commission of Illinois.

Plaintiff concedes that under the construction of section 22 of the Workmen's Compensation Act, by the Supreme court of this state in the cases of Friebel v. Chicago City Railway Co., 280 Ill. 76; and Gones v. Fisher, 286 Ill. 606, suit cannot be commenced by the employer against the negligent third person until the amount of the compensation payable by the employer to the employee has been fixed or determined by agreement or award.

It is insisted, however:

First, that the action is not one for personal injuries, but is a new cause of action granted plaintiff by reason of section

it, from which judgment this appeal has been taken and postponed in this court.

Chapter 70, paragraph 2, section 1, of chapter 1, of the laws of 1901, is amended to read as follows:

Illinois Revised Statutes of 1981, being as set concerning said
 for persons and entities subject to said Illinois Revised Statutes of 1981, and persons and entities

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subject to the provisions of the "Foreign Corrupt Practices Act," 15 U.S.C. § 78jbb-1, et seq., and the "Foreign Corrupt Practices Act," 15 U.S.C. § 78jbb-1, et seq.

and having been joined, Whittell will be required to, submit

reason of the negligence of the defendant - his employer. The

Liability in this case, however, extended to all the ships of the

Employees Institute against the City of Chicago, the Defendant, for

injuries sustained by the negligence of the defendant, after having

and at this time the amount retained by the Industrial Commission

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Thirtieth sentence that under the constitution of section

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state in the case of United v. Chicago City Railway Co., 309 U.S. 111.

78; and Jones v. Hight, 188 Ill. 303, this cannot be commuted by

the Bureau and its members, by the facilities and various volumes of

the compensation payable by the employer to the employee has been

What is the source of the information to be used?

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Thus, the action is not the same for various λ .

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29 of the Workmen's Compensation Act and which accrued to it after the payment of the award fixed by the Industrial Commission:

Second, that even though it may be a suit for personal injuries, the action is tolled by paragraph 24, section 23 of the Limitations Act, which provides as follows:

"When the commencement of an action is stayed by injunction, order of a judge or court, or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the actions."

As to the first proposition we consider that it has been settled adversely to the contention of the plaintiff. The Supreme Court of this state in the case of Hehlitz Brewing Co. v. Chicago Rys. Co., 307 Ill. 332, in its opinion said;

"We think it must be regarded as settled by our decisions that the right of action conferred on the employer by section 29 is the same right of action the employee had before the adoption of the act, transferred to the employer, and the same Statute of Limitations applies to a suit by the employer which applied to the employee."

The court in the case just cited, stated that the construction given to section 29 in many instances might defeat a recovery by the employer because of the fact that the total amount due had not been finally fixed or determined within the statutory period, but refused to modify its ruling on that account. It is suggested, however, in said opinion that the remedy, if any, should be provided by the state legislature which had enacted the law known as the Workmen's Compensation Act.

Counsel for plaintiff urge in support of their position under section 23 of the Limitations Act, that section 29 of the Workmen's Compensation Act amounted to a statutory prohibition against the commencement of the action within the meaning of section 23 of the Limitations Act. It is insisted that this question has not been passed upon by the Supreme Court and if its attention were called

50 of the Workmen's Compensation Act and which amounts to its effect

the payment of the award fixed by the Industrial Commission;

Second, that even though it may be a suit for personal

injury, the action is barred by paragraph 34, section 33 of the

Limitations Act, which provides as follows:

"When the commencement of an action is stayed by
injunction, order of a Judge of Court, or otherwise from
proceeding, the time of the limitation of the limitation
of provisions is not counted as the time limited for the
commencement of the action."

As to the first proposition we consider that it has

been settled adversely to the contention of the plaintiff. The

Supreme Court of this state in the case of Smith v. Smith, 200

Mich. 211, 212, 191, in its opinion said:

"We think it must be understood as settled by the
decision that the right of action survives as the law
relates to limitation is in the case of action for
injury and before the expiration of the time limited for
the bringing of the action, and the time limited for the
bringing of the action shall be counted as the time limited."

The court in the case just cited, stated that the limitation given

in section 33 is only inoperative as to the remedy by law

employer because of the fact that the total amount due had not been

finally fixed or determined within the statutory period, and returned

to modify the ruling on that account. It is suggested, however, in

such opinion that the remedy, if any, should be provided by the state

legislature which has enacted the law under the Workmen's Compensation

Act.

Secondly for this with only in account of their position

under section 33 of the Limitations Act, that section 33 of the

Workmen's Compensation Act amounted to a statutory prohibition against

the commencement of the action within the meaning of section 33 of

the Limitations Act. It is insisted that this question has not been

passed upon by the Supreme Court and if the attention were called

to this particular provision, it might be that it would construe it in connection with section 23 of the Workmen's Compensation Act and hold that the statute was tolled. There is considerable force in this contention, but in view of the fact that the Supreme Court has so definitely decided that the cause of action is transferred to the employer and is subject to the same limitations in the employer as it was in the employee, we do not feel that we should do other than follow the Supreme Court. It may be assumed that section 23 of the Limitations Act was before the court when its decision was rendered in the case of Hoblitz Brewing Co. v. Chicago Ry. Co., supra.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

to this particular provision, it might be that it would operate
in connection with section 22 of the Workmen's Compensation Act
and hold that the statute was failed. There is considerable force
in this contention, but in view of the fact that the Supreme Court
has so definitely decided that the cause of action is transferred
to the employer and is subject to the same limitations in the
employer as it was in the employee, we do not feel that we should
do other than follow the Supreme Court. It may be assumed that
section 22 of the limitations act was before the court when the
decision was rendered in the case of DeLia's Furniture Co. v. Chicago

Ind. Ins. Comm.

Let the reasons stated in this opinion, for judgment
of the Superior Court be affirmed.

FOURTH JUDGE.

RECEIVED, 1914, JAN. 15, 1914.

35566

ELIZABETH ROBERTS,

(Plaintiff Below) Appellant,

v.

WM. D. MEYERING, Sheriff and
CLIFFORD SHARE,

(Defendants Below) Appellees.

APPEAL FROM

MUNICIPAL COURT

267 I.A. 603⁴

OF CHICAGO.

Opinion filed June 15, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Clifford Share, a defendant below, recovered a judgment in the Superior Court for \$600 against Fred F. Roberts. An execution issued and was levied upon a Buick ambulance and Cadillac hearse used by Roberts in his business as an undertaker. Elizabeth Roberts, wife of Fred F. Roberts, brought a right of property action in the Municipal Court against Clifford Share and Wm. D. Meyering, Sheriff of Cook County, claiming the property as her own. A jury trial was had resulting in a verdict in favor of Share and Meyering and against the plaintiff.

During the trial plaintiff attempted to show that the Buick ambulance and the Cadillac hearse belonged to her and that she had leased these to Roberts, her husband, under an oral agreement. The question of ownership was properly left to the jury under facts which warranted its submission. The fact that Fred Roberts had the automobiles in question in his possession and used and operated them under his own name, is a strong presumption of ownership. On the other hand, if the property in question was purchased by his wife out of her individual funds, there is no fraud as a matter of law in permitting the defendant to operate them for a consideration.

Under the circumstances in this case, however, it was necessary that the jury should have been accurately instructed. Among other things, the court instructed the jury that it had the right

38886

ELIZABETH ROBERTS

(Plaintiff in Error)

vs. FRED T. ROBERTS and
CLIFFORD CLARE

(Defendants in Error)

Opinion filed June 15, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

CLIFFORD CLARE, a defendant below, recovered a judgment

in the Superior Court for \$500 against Fred T. Roberts. An execution

issued and was levied upon a Buick automobile and Cadillac motor

used by Roberts in his business as an undertaker. Elizabeth Roberts,

wife of Fred T. Roberts, brought a writ of property action in the

Municipal Court against Clifford Clare and Dr. G. H. Hoyerling, Sheriff

of Cook County, claiming the property as her own. A jury trial was

had resulting in a verdict in favor of Clare and Hoyerling and against

the plaintiff.

During the trial plaintiff attempted to show that the

Buick automobile and the Cadillac motor belonged to her and that she

had leased these to Roberts, her husband, under an oral agreement.

The question of ownership was properly left to the jury under these

which warranted its submission. The fact that Fred Roberts had

the automobiles in question in his possession and used and operated

them under his own name, is a strong presumption of ownership. On

the other hand, if the property in question was purchased by his wife

out of her individual funds, there is no fraud as a matter of law in

permitting the defendant to operate them for a commission.

Under the circumstances in this case, plaintiff, if not

entitled to a new trial, should have been awarded judgment. The

to take into consideration:

"the fact that the testimony particularly within the control of the plaintiff in this case, and which he could produce, has not been produced, in determining the issues in this case."

We presume that the court used the expression "which he could produce" when it was intended to be "which she could produce," as Elizabeth Roberts was the plaintiff and not Fred Roberts. A more serious objection to this part of the instruction is, however, the fact that the testimony of the plaintiff is singled out and particular attention attached to the fact that she could, if she desired, produce evidence which would have materially assisted in determining the issues in the case. From this the jury could well determine that the court was of the opinion that the plaintiff not having produced this testimony, there was insufficient proof to determine the issues in her favor.

The Supreme Court of this state in the case of Moore v. Wright, 90 Ill. 470, in its opinion says:

"Both instructions given for plaintiff are objectionable and ought not to have been given. The first of the series directs the attention of the jury to certain principal facts upon which plaintiff relies, and tells them, if they believe, from the evidence, such facts have been proved, they will find for plaintiff. This instruction is wrong, as it only presents a partial view of the facts. It is the duty of the jury to consider all the testimony in the case, as well that which makes for defendant as for plaintiff, and for the court to direct them to consider certain facts is to give undue importance to them, and is serious error.

The second instruction is still more objectionable. It was a personal privilege, that defendant could avail of at his election, whether he would become a witness in his own behalf, with which the jury had nothing to do, and it was not proper for the court to call their attention to the subject in any way. It may have prejudiced defendant's cause."

What the facts within the control of the plaintiff were we are unable to determine. The jury could not help gather the opinion from the instruction that the plaintiff was withholding certain information which would have had a material bearing on the

case. We believe the court erred in singling out the plaintiff in the failure to produce evidence. In the giving of this instruction to the jury, there was manifest error.

The judgment of the Municipal court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

case, he believed the most likely to succeed was the possibility
 in the future of making a settlement, in the light of the
 instructions to the jury, that they were entitled to
 The judgment of the jury is in favor of the plaintiff and
 the amount awarded for a new trial.
 JUDGMENT REVERSED AND CASE REMANDED.

WILLIAM L. AND OTHERS, PLAINTIFFS,
 vs.
 JAMES L. AND OTHERS, DEFENDANTS.

The following is a summary of the facts and circumstances of the case as presented to the jury. The plaintiff, William L. and others, claim that the defendant, James L. and others, have wrongfully taken possession of certain property belonging to the plaintiff. The defendant denies this claim and asserts that the property is his own. The jury is instructed to consider the evidence presented by both parties and to render a verdict based on the facts and circumstances as they find them. The plaintiff's evidence includes testimony from several witnesses who claim to have seen the defendant taking possession of the property. The defendant's evidence includes testimony from several witnesses who claim to have seen the plaintiff taking possession of the property. The jury is also instructed to consider the evidence of the parties' conduct and to determine whether the defendant's actions were justified. The jury is further instructed to consider the evidence of the parties' intentions and to determine whether the defendant's actions were intended to deprive the plaintiff of his property. The jury is finally instructed to consider the evidence of the parties' knowledge and to determine whether the defendant's actions were knowing and intentional. The jury is to render a verdict based on the facts and circumstances as they find them, and to award damages to the plaintiff if the defendant is found liable.

35575

G. FRIEDMAN, trading as
SAFEWAY FINANCE COMPANY,

(Plaintiff) Appellee,

v.

CLARK STREET GARAGE, a
corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

267 I.A. 603'
OF CHICAGO.

Opinion filed June 15, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, G. Friedman, trading as Sefeway Finance Company, brought his action in replevin to recover possession of a Ford sedan. Plaintiff's claim is based on a note and chattel mortgage given by the owner of the car to the plaintiff and upon which chattel mortgage there had been a default. The property not being found the action was changed to trover. The defendant pleaded a garage keeper's lien, which it was claimed amounted to \$95.75.

At the time the note and chattel mortgage were given, the car was in the possession of the owner; the plaintiff examined it and took the note and chattel mortgage while the car was in front of the office of the plaintiff on LaSalle Street in the City of Chicago.

It is not denied that the owner was allowed to use the car and took it out of the garage whenever desired. The value of the automobile was established at \$275 and plaintiff's claim was proven to be the sum of \$260.04.

Upon a hearing by the court without a jury, Wolf, manager of the Clark Street Garage, testified that the car had been stored with them since January, 1929, and that the owner was allowed to take the car out every day and on some occasions kept it out over night. He testified that the owner owed them \$95.75, for storage. No books were produced, the witness was unable to

10072

G. E. WILSON, trading as
GARY TRADING COMPANY,
(Plaintiff) vs.
CLARK BATTERY GARAGE, a
corporation,
(Defendant)

SET I.A. 603
IN CHARGE

Opinion filed June 18, 1933

CLARK BATTERY GARAGE, a corporation, trading as Gary Trading Company, brought this action in replevin to recover possession of a Ford sedan. Plaintiff's claim is based on a note and chattel mortgage given by the owner of the car to the plaintiff and upon which chattel mortgage there had been a default. The property not being found the action was changed to trover. The defendant pleaded a garage keeper's lien, which it was claimed amounted to \$55.75. At the time the note and chattel mortgage were given, the car was in the possession of the owner; the plaintiff examined it and took the note and chattel mortgage while the car was in front of the office of the plaintiff on Madison Street in the City of Chicago. It is not denied that the owner was allowed to use the car and took it out of the garage whenever desired. The value of the automobile was established at \$375 and plaintiff's claim was proved to be the sum of \$380.01. Upon a hearing by the court without a jury, Wolf, manager of the Clark Street Garage, testified that the car had been stored with them since January, 1932, and that the owner was allowed to take the car out every day and on some occasions kept it out over night. He testified that the owner owed them \$55.75 for storage. No books were produced, the witness was unable to

state how he arrived at the figure of \$35.75, and did not appear to know what period of time was covered by this claim for storage. No explanation was made as to why the car was not still in the possession of the defendant, nor was there any explanation as to what had become of it.

The note and chattel mortgage were dated February 25, 1931. The affidavit of replevin was dated June 16, 1931. The testimony in support of the claim of the defendant as to the amount of the storage due was not impressive and the court was justified in rejecting it. The books of the company, which would have been the best evidence, were not produced and the testimony of the witness was indefinite and uncertain. The car was in the possession of the owner at the time the chattel mortgage was given and there was nothing in the record to indicate that the plaintiff had knowledge of any prior lien. Grand Garage, Inc. v. Pacific Bank, 170 N. Y. S. 2.

The judgment rendered in this case by the Municipal Court, however, was for the full value of the property instead of for the amount due under the chattel mortgage. We are of the opinion that the judgment should have been for the sum of \$200.04, being the amount due on the note and mortgage. This amount is undisputed and is less than the amount of the judgment entered. Nat'l. Bond and Investment Co. v. Shirra, 255 Ill. App. 415.

For the reasons stated in this opinion the judgment of the Municipal Court is corrected as to the amount, and judgment is entered here in favor of the plaintiff for the sum of \$200.04, together with the costs of this proceeding.

JUDGMENT AFFIRMED AS CORRECTED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

state how he arrived at the figure of \$25.75, and did not appear to know what period of time was covered by this claim for storage. No explanation was made as to why the car was not still in the possession of the defendant, nor was there any explanation as to what had become of it.

The note and chattel mortgages were dated February 22, 1921. The affidavit of verification was dated June 16, 1921. The testimony in support of the claim of the defendant as to the amount of the storage due was not impeached and the court was justified in rejecting it. The books of the company, which would have been the best evidence, were not produced and the testimony of the witnesses was indefinite and uncorroborated. The car was in the possession of the owner at the time the chattel mortgage was given and there was nothing in the record to indicate that the plaintiff had knowledge of any prior lien. Grand National Ins. Co. v. Pacific Bank, 170 N. Y.

2. 2. The judgment rendered in this case by the Municipal Court, however, was for the full value of the property instead of for the amount due under the chattel mortgage. In one of the opinions that the judgment should have been for the sum of \$250.00, being the amount due on the note and mortgage. This amount is undisputed and is less than the amount of the judgment entered. Wells Fargo & Co. v. City of New York, 111 N. Y. 215.

For the reasons stated in this opinion the judgment of the Municipal Court is corrected as to the amount, and judgment is entered here in favor of the plaintiff for the sum of \$250.00, together with the costs of this proceeding.

THOMAS ATTORNEY AT COUNSEL.

35650

HARDY-RYAN ABSTRACT COMPANY,
a corporation,

Defendant in Error,

v.

FRANK L. HUME,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

267 I.A. 603

Opinion filed June 15, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff, Hardy-Ryan Abstract Company, brought its action in assumpsit on certain promissory notes secured by a first mortgage on real estate owned by the defendant, Frank L. Hume. The defendant filed a plea of the general issue and certain affidavits setting up special matters of defense, and among others, the defense of conditional delivery. At the conclusion of the trial the court directed a verdict in favor of the plaintiff and judgment was entered on the verdict in favor of the plaintiff, from which judgment this appeal is taken.

From the facts it appears that the defendant obtained the real estate covered by the mortgage from one Emil H. Bauch and at the same time assumed a mortgage aggregating \$10,000.00, upon the property. He paid part of the interest due on the note from time to time and in the spring of 1926, Bauch called upon him with regard to a renewal of this mortgage and there appears to have been an extended conversation between them with regard to the procuring of a new note and a new mortgage in place of the then existing note and mortgage. The defendant testified that Bauch said he had been sent by the Hardy-Ryan Abstract Company (the plaintiff in this proceeding) and wanted to know what he, the defendant, was going to do in regard to the mortgages and that he told Bauch that he did not intend doing anything; that Bauch

HARDY-KYAN ABSTRACT COMPANY,
a corporation.

Defendant in Error.

CIVIL COURT.

FRANK L. HUGHES,

Plaintiff in Error.

267 I.A. 603

Opinion filed June 15, 1933

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff, Hardy-Kyan Abstract Company, against the

defendant in error, Frank L. Hughes.

The defendant owned by the defendant, Frank L. Hughes,

the defendant filed a bill of the general issue and certain other

facts arising on special matters of fact, and sought judgment

the defense of conditional delivery. At the conclusion of the

trial the court entered a verdict in favor of the plaintiff and

judgment was entered on the verdict in favor of the plaintiff,

from which judgment this appeal is taken.

From the facts it appears that the defendant obtained

the real estate covered by the mortgage from one Earl H. Houch

and at the same time obtained a mortgage representing \$10,000.00,

upon the property. He paid part of the interest due on the note

from time to time and in the spring of 1932, Houch called upon him

with regard to a renewal of this mortgage and there appears to

have been an extended conversation between them with regard to

the procuring of a new note and a new mortgage in place of the

then existing note and mortgage. The defendant testified that

Houch said he had been sent by the Hardy-Kyan Abstract Company

(the plaintiff in this proceeding) and wanted to know what he

the defendant, was going to do in regard to the mortgage and that

he told Houch that he did not intend doing anything; that Houch

thereupon stated that the Abstract Company did not want to see the mortgage foreclosed because it was held by a client of that company, but that they would take a new mortgage back on the land; that defendant answered that he did not want to do that because he did not wish to pay the mortgage and that if a new one was made he would be obliged to pay it; that Bauch said if the company would undertake to get defendant a deal, by way of exchange or sale, that would yield enough to pay for this new mortgage, would he (the defendant) make the deal, and that the defendant stated that he might do that if he was not expected to pay the new mortgage until the deal had been obtained; that Bauch left, to return several weeks later with the new mortgage papers and that he, the defendant, examined and signed them and handed them to Bauch and said, "Mr. Bauch, you know the arrangement is that I am not to pay any part of the principal or interest of this new mortgage until the Hardy-Ryan Abstract Company gets for me a deal that will permit me to do that." That Bauch said that was the arrangement and that it would work all right; that later on Hardy-Ryan Abstract Company sent him the old mortgage and the papers releasing it.

Bauch testified on behalf of the plaintiff that he did see the defendant in regard to making a new note and mortgage, but denied that he ever stated at any time to the defendant that he, the defendant, would not have to pay the note until the property was sold.

The point is made in support of the judgment that the plea of the defendant was not verified by affidavit and that, therefore, the defendant should not be permitted upon the trial to deny delivery. It also appears from the facts in evidence that after the execution of the new note and mortgage, part of the property covered by the mortgage was sold by the defendant with the consent of the mortgagor and the proceeds applied upon interest due on the mortgage and this is claimed to be a waiver of defendant's position that there was a conditional delivery

thereupon stated that the American Company did not want to see
the mortgage foreclosed because it was held by a client of that
company, but that they would take a new mortgage back on the land;
that defendant answered that he did not want to do that because he
did not wish to pay the mortgage and that it was now made he
would be obliged to pay it; that Hanch said if the company would
undertake to get defendant a deal, by way of exchange or sale,
that would yield enough to pay this new mortgage, would he
(the defendant) make the deal, and that the defendant stated that
he might do that if he was not expected to pay the new mortgage
until the deal had been obtained; that Hanch told, to return however,
again later with the new mortgage papers and that he, the defend-
ant, examined and signed them and handed them to Hanch and said,
"Mr. Hanch, you know the arrangement is that I am not to pay any
part of the principal or interest of this new mortgage until the
mortgage interest money gets to me and that will settle
me so far." That Hanch said that was the arrangement and
that is what work all right; that later on Hanch-Hen Hanch
Company sent him the old mortgage and the papers relating to it.
Hanch testified on behalf of the plaintiff that he did
see the defendant in regard to making a new note and mortgage,
and denied that he ever stated at any time to the defendant that
he, the defendant, would not have to pay the note until the property
was sold.
The point is made in support of the judgment that the
plea of the defendant was not verified by affidavit and that,
therefore, the defendant should not be permitted upon the trial
to deny delivery. It also appears from the facts in evidence
that after the execution of the new note and mortgage, part of
the property covered by the mortgage was sold by the defendant
with the consent of the mortgagee and the proceeds applied upon
interest due on the mortgage and this is claimed to be a waiver

inasmuch as the defendant requested the mortgagor to consent to this sale.

In our opinion, however, the principal point raised is whether the facts in evidence indicate a delivery of the note and mortgage upon condition, or whether it was an unconditional delivery, coupled with an arrangement as to payment. The defendant appears to have been mistaken in his testimony to the effect that he had not assumed an obligation as to the prior note and mortgage. When this prior mortgage was introduced in evidence, it clearly appears that the defendant had assumed its payment. The real estate, of course, was subject to the mortgage, and the plaintiff in the purchase of the property, directly assumed that obligation. If it should develop that the old note and mortgage was released and a new note and mortgage given conditionally, the plaintiff would have lost its security and the defendant would have received the sole benefit of the transaction. It is not reasonable to assume that the plaintiff would have consented to such an agreement. The note and mortgage were clear and unequivocal in their terms and the burden of proof was upon the defendant to show otherwise.

Defendant relies upon the case of Hell v. McDonald, 308 Ill. 329. In that case the notes were given as collateral security only, and their complete delivery was dependent upon the condition that the maker would fail to pay over money collected by him as representative of the payee. It was there held that evidence was admissible for the purpose of showing that the instrument was not to take effect as a valid obligation until the happening of some future contingency. The general rule is that parol evidence is not permissible to vary the terms of a written instrument, but the court in the case cited held that such evidence did not vary the terms of the instrument, but was admissible for the purpose of showing the manner of delivery. In the case of Hell v. McDonald,

inasmuch as the defendant requested the mortgage to be made in this way.

In our opinion, however, the principal point raised is

whether the fact is sufficient to constitute a delivery of the note and mortgage upon condition, or whether it can be considered as a delivery coupled with an agreement as to payment. The defendant appears to have been mistaken in his testimony as to the effect that he had not received an obligation as to the price note and mortgage. When this prior mortgage was introduced in evidence, it clearly appears that the defendant had assumed its payment. The real estate, of course, was subject to the mortgage, and the plaintiff in the purchase of the property, directly assumed that obligation. If it should develop that the old note and mortgage were released and a new note and mortgage given conditionally, the plaintiff would have lost his security and the defendant would have received the sole benefit of the transaction. It is not reasonable to assume that the plaintiff would have consented to such an agreement. The note and mortgage were clean and unencumbered in their terms and the burden of proof was upon the defendant to show otherwise.

Defendant relies upon the case of Ball v. Ball, 208 Ill. 127. In that case the notes were given as collateral security only, and their complete delivery was held to upon the condition that the maker would fail to pay over money collected by him as representative of the notes. It was there held that evidence was admissible for the purpose of showing that the instrument was not so given as a valid obligation until the happening of some future contingency. The general rule is that prior evidence is not permissible to vary the terms of a written instrument, but the court in the case cited held that such evidence did not vary the terms of the instrument, but was admissible for the purpose of showing the manner of delivery. In the case of Ball v. Ball, 208 Ill.

no consideration was received by the maker of the notes at the time they were delivered. In the case at bar there was a consideration in that there was an extension of time and a release of the old note and mortgage.

This court in the case of Handley v. Drum, et al, 237 Ill. App. 587, had occasion to consider the question on facts very similar to those involved in this proceeding. It appears in that case that notes were given in part payment of certain shares of stock of the Eagle Battery Sales Corporation and it was stipulated between the parties at the time that the note was not to take effect until such dividends had been paid upon the stock as would amount to the face value of the note with interest. In the instant case, according to defendant's own testimony, he was not to pay any part of the principal or interest until the Hardy-Ryan Abstract Company procured a deal for the sale of the property sufficient to pay defendant's obligation. Following the reasoning in the case of Handley v. Drum, we are of the opinion that this did not amount to a conditional delivery, but was an agreement as to the manner of payment. Textmeyer v. Nordlund, 259 Ill. App. 247; Mingdale State Bank v. Lytle, 262 Ill. App. 151.

A note secured by a mortgage is a solemn undertaking and agreement, and every intendment should be indulged in favor of its validity. If defendant's contention were correct, the note and mortgage sued upon would be incapable of collection in the event the payee could not procure a purchaser for the property.

From the facts in evidence we believe the trial court was warranted in directing the jury to find a verdict in favor of the plaintiff, and for this reason, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

no consideration was received by the maker of the notes at the time they were delivered. In the same way there was a consideration in that there was an expenditure of time and a release of the old note and mortgage.

This court in the case of Madison v. Hume, et al., 237 Ill. App. 587, had occasion to consider the question on facts very similar to those involved in this proceeding. It appears in that case that notes were given in part payment of certain shares of stock of the Madison-History Sales Corporation and it was stipulated between the parties at the time that the note was not to take effect until such dividends had been paid upon the stock as would amount to the face value of the note with interest. In the instant case, according to defendant's own testimony, he was not to pay any part of the principal or interest until the thirty-day interest company procured a deed for the sale of the property sufficient to pay defendant's obligation. Following the reasoning in the case of Madison v. Hume, et al., 237 Ill. App. 587, it is not found in a conditional delivery, but was an agreement as to the manner of payment. Madison v. Hume, et al., 237 Ill. App. 587.

A note secured by a mortgage is a negotiable instrument and payment, and every instrument should be indorsed in favor of the holder. If defendant's contention were correct, the note and mortgage would upon would be incapable of collection in the event the paper could not become a promissory note for the property. From the facts in evidence we believe the trial court was warranted in directing the jury to find a verdict in favor of the plaintiff, and for this reason, the judgment of the circuit Court is affirmed.

35656

RUTH KANIEF,

(Complainant) Appellee,

v.

PAUL WILLIAM KANIEF,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT,

267 I.A. 603*

COCK COUNTY.

Opinion filed June 15, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The complainant, Ruth Kanief, filed her petition in the Circuit Court charging that the defendant Paul William Kanief was in default in the payment of alimony as provided in the decree entered in the Circuit Court April 31, 1924, and praying that he be ruled to show cause why he should not be held in contempt of court for failure to comply with the provisions of the decree.

From the facts it appears that the original decree found the issues in favor of the complainant in the divorce proceeding and the defendant was ordered to pay \$30 a week as alimony for the support of the defendant and her two minor children. The decree further provided that upon the elder of said children reaching the age of 18 years, the payments should then be reduced to \$15 per week, which was to continue until and unless the complainant should remarry. The payments appear to have been made up to and including August 26, 1930, at which time he was required to pay only the sum of \$15 a week. No further sum whatsoever had been paid by the defendant up to the time of the filing of the petition on September 23, 1931, and there appears to have become due the sum of \$635. The defendant appears to have remarried and his present wife was earning between \$50 and \$57.50 a week at the time of the hearing. The defendant was paying rent for an apartment at the Selden-Stratford Hotel at the rate of \$150 per month and owned a Buick car which was purchased in 1927. He was a dentist by profession. Prior

367 I.A. 603
 CIVIL COURT
 JUDGE
 JUNE 12, 1932

ROTH KAHN,
 (Defendant)
 V.
 JANE WILLIAM KAHN,
 (Plaintiff)

Opinion filed June 12, 1932

MR. JUSTICE WILSON delivered the opinion of the court.
 The complaint, with answer, filed her petition in
 the district court charging that the defendant, Jane William Kahn,
 was in default in the payment of alimony as provided in the decree
 entered in the district court April 21, 1932, and praying that she be
 ruled to show cause why she should not be held in contempt of court
 for failure to comply with the provisions of the decree.
 From the facts it appears that the original decree
 found the issues in favor of the complainant in the divorce pro-
 ceeding and the defendant was ordered to pay \$30 a week as alimony
 for the support of the defendant and her two minor children. The
 decree further provided that upon the death of said children reaching
 the age of 18 years, the payments should then be reduced to \$15 per
 week, which was to continue until and unless the complainant should
 remarry. The payments appear to have been made up to and including
 August 28, 1932, at which time he was required to pay only the
 sum of \$15 a week. No further sum whatsoever had been paid by the
 defendant up to the time of the filing of the petition on September
 28, 1932, and there appears to have been no sum of \$15.
 The defendant appears to have remarried and his present wife was
 married between 1930 and 1932. \$15 a week at the time of the hearing.
 The defendant was paying rent for an apartment at the Union-
 Square Hotel at the rate of \$150 per month and owned a car and

to August, 1930, it appears that the defendant had been earning approximately \$300 per month, but testified upon the hearing that his income had gradually decreased and that his average monthly income from August 1930 until September 1931, had amounted to approximately \$57.50. It also appears from the evidence that there was a room in the apartment which was used as a studio by his present wife for the purpose of carrying on her business or occupation. He did not pay garage bills for his Buick car, but parked it on the street and the upkeep was not to exceed 50¢ or 60¢ a week. His earnings as a dentist appear to have become greatly decreased, although it appears that he has between \$1,000 and \$1,200 due on outstanding accounts which are good and collectible.

The only question involved is one of fact as to whether or not, under the circumstances as shown by the proof, the defendant had shown an inability to pay any or all of the amount claimed or whether the refusal to pay was because of an unwillingness to comply with the decree entered against him. The burden of proof was upon the defendant to justify his position. It would have been sufficient to have shown that his disobedience had not been willful, but solely because of his inability to pay and this would have been sufficient to have required his discharge from the rule. Nevertheless, the court had a right to and probably did consider the fact that no payment of any kind whatsoever had been made during a period of over one year and no effort was made on the part of the defendant to obtain a modification of the decree.

From the facts, there is nothing which shows any attempt on the part of the defendant to in any way conform to the order of the Circuit Court during a considerable period of time and there was sufficient evidence to justify the chancellor in his opinion that this amounted to a willful disobedience of the order providing for

to August, 1933, it appears that the defendant had been earning approximately \$200 per month, but testified upon the hearing that his income had gradually decreased and that his average monthly income from August 1933 until September 1934, had amounted to approximately \$57.50. It also appears from the evidence that there was a room in the apartment building, 225 West 11th Street, New York City, which was used by the defendant for the purpose of carrying on her business as a seamstress. It did not appear that the defendant was engaged in any other business, and it seems that she was engaged in a business as a seamstress in the apartment building, 225 West 11th Street, New York City, and it appears that she was engaged in this business from August, 1933, until September, 1934. It appears that she was engaged in this business from August, 1933, until September, 1934, and it appears that she was engaged in this business from August, 1933, until September, 1934.

The only question involved is one of fact as to whether or not, under the circumstances as shown by the proof, the defendant had shown an inability to pay any or all of the amount claimed or whether the refusal to pay was because of an unwillingness to comply with the terms ordered against him. The burden of proof was upon the defendant to justify his position. It would have been sufficient to have shown that his disobedience had not been willful, but solely because of his inability to pay and this would have been sufficient to have justified his disobedience from the rule. Nevertheless, the court had a right to and presumably did consider the fact that no payment of any kind whatever had been made during a period of over one year and no effort was made on the part of the defendant to obtain a modification of the decree.

From the record there is nothing which shows any attempt on the part of the defendant to in any way comply to the order of the court during a considerable period of time and there was sufficient evidence to justify the chancellor in his opinion that this amounted to a willful disobedience of the order providing for

the payment of alimony. We fully realize the fact that there has been a substantial change in the financial structure of the world and that prices have decreased and collections made difficult, but, at the same time, it is to be borne in mind that the first wife has met with the same conditions as the defendant in the case at bar. If the defendant had had any concern for her welfare it would have required but little effort on his part to have provided something, if not all, of the required payments. Upon an application by the defendant to have the decree modified, under the existing circumstances, the court probably would have recognized the condition of the defendant and changed the situation. It may have been that if the case had been before this court in the first instance some provision might have been made for future payments, provided the defendant evidenced a willingness to comply with future orders without resorting to the extreme penalty, but this was a matter for the chancellor and we are unable to say that his ruling was such as to justify a reversal of the cause. The burden of proof was upon the defendant and the petitioner had no means of disputing the proof offered. Any payment would have indicated willingness to conform to the decree. Deen v. Slocmer, 191 Ill. 416; Shaffner v. Shaffner, 191 Ill. 492.

The chancellor had an opportunity of seeing the witnesses and observing their demeanor while upon the stand. We do not feel that we should substitute the judgment of this court for that of the chancellor.

For the reasons stated in this opinion, the order of the Circuit Court is affirmed.

ORDER AFFIRMED.

the payment of alimony. In fully realizing the fact that there has been a substantial change in the financial structure of the world and that there have been changes in the financial structure of the world at the same time, it is to be noted in mind that the first wife has not with the same conditions as the defendant in the case at bar. If the defendant had had any concern for her welfare it would have required but little effort on his part to have provided some thing, it not all, of the required payments. Upon an application by the defendant to have the decree modified, under the existing circumstances, the court probably would have recognized the condition of the defendant and changed the situation. It may have been that at the time had been before this court in the first instance some provision might have been made for future payments, provided the defendant witnesses a willingness to comply with terms made without prejudice in the present decree, and this was a matter for the discretion of the court as to what his ruling was and as to justify a reversal of the decree. The burden of proof was upon the defendant and the position had no means of discharging the same. The court would have indicated willingness to grant a reversal of the decree. See W. v. W., 121 Ill. 410; W. v. W., 121 Ill. 410.

The chancellor had an opportunity of seeing the witnesses and reviewing their testimony and upon the whole, he was not to be held responsible for the judgment of this court for that of the chancellor.

The court is of the opinion that the decree should be affirmed, the court of the circuit is affirmed.

W. v. W.

35669

SOUTH PARK COMMISSIONERS,
(Plaintiff) Appellee,
v.
HARRY VESTED,
(Defendant) Appellant.

30
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

267 L.A. 604

Opinion filed June 15, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The statement of claim filed in this cause charges that a certain lamp post belonging to the plaintiff and located at or near the intersection of the Outer Drive and 24th Street in the City of Chicago was damaged by reason of the negligent operation of a motor vehicle driven by an agent or servant of the defendant. Defendant filed an affidavit of merits denying that he, or his agent or servant, drove, managed or operated the car at the time of the alleged damage to the lamp post in question, and denied that the defendant is indebted to the plaintiff in any sum whatsoever. The cause was tried by the court without a jury and the plaintiff's damages assessed at the sum of \$31.80 and judgment entered against the defendant for that amount.

The defendant testified that he was not driving the car in question at the time of the alleged damage to the lamp post, but that the car was being operated by his son who was not at the time engaged on any commission or business for the defendant but was driving the vehicle for his own pleasure and for no other purpose. There is no other evidence in the record concerning this particular question. A parent is not liable for the tort of his minor child merely because of that relationship, nor is the owner of an automobile who permits any person to use it liable because

33333

SOUTH PARK COMMISSIONERS,

(Plaintiff)

v.

HARRY KENTON,

(Defendant) Appellant.

Opinion filed June 15, 1932

MR. JUSTICE KILPATRICK DELIVERED THE OPINION OF THE COURT.

The statement of claim filed in this cause charges that a certain lamp post belonging to the plaintiff and located at or near the intersection of the Outer Drive and 24th Street in the City of Chicago was damaged by reason of the negligent operation of a motor vehicle driven by an agent or servant of the defendant. Defendant filed an affidavit of denial denying that he, or his agent or servant, drove, managed or operated the car at the time of the alleged damage to the lamp post in question and denied that the defendant is indebted to the plaintiff in any sum whatever. The cause was tried by the court without a jury and the plaintiff's damages assessed at the sum of \$21.50 and judgment entered against the defendant for that amount.

The defendant testified that he was not driving the car in question at the time of the alleged damage to the lamp post but that the car was being operated by his son who was not at the time engaged on any commission or business for the defendant but was driving the vehicle for his own pleasure and for no other purpose. There is no other evidence in the record concerning this particular question. A parent is not liable for the tort of his minor child merely because of that relationship, nor is the owner of an automobile who permits any person to use it liable because

of the negligence of such other person in its use. White v. Seitz, 342 Ill. 266. This rule is too well settled in this state to require the citation of numerous authorities.

There being no testimony in contradiction of the facts testified to by the defendant, and there being no attendant circumstances tending to prove any other or different facts, the court should have directed a verdict for the defendant.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HENEL, P. J. AND FRIEND, J. CONCUR.

of the negligence of each other person in the way. Wills v. Wills, 202 Ill. 208. This rule is now well settled in this State as regards the liability of married couples.

There being no testimony in contradiction of the facts testified to by the defendant, and there being no circumstances tending to prove any other or different facts, the court should have directed a verdict for the defendant.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

THOMAS J. CONNELLEY, JUDGE.

WILLIAMS, J. J. AND OTHERS, PLAINTIFFS, vs. CONNELLEY, JUDGE.

35710

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

JACK KRAL,

Plaintiff in Error.

BRIDGE TO

CRIMINAL HOUSE.

COOK COUNTY.

267 I.A. 604

Opinion filed June 15, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

Jack Kral, the defendant, was arrested September 4, 1931, at 2:40 o'clock in the morning; was tried in the Criminal Court of Cook County by the court without a jury; was found guilty under two counts of the indictment, convicted and sentenced to one year in the House of Correction upon each count, the sentences to run consecutively.

The first count of the indictment is what is known as Section 1 of the Deadly Weapons Act, Cahill's Illinois Revised Statutes of 1931, Criminal Code, paragraph 141. The second count of the indictment was a violation of Section 2-A of the same Act found in paragraph 141.

Officer English, on behalf of The People, testified that he was a member of the Oak Park Police Department and that on September 4, 1931, he and another officer named Jensen were in a squad car when they noticed two men get out of a parked automobile and they intercepted them; that he and the other officer demanded that they halt; that the two men ran down a passageway in the rear of certain buildings. The officers followed them and found the defendant lying on a ladder underneath a stairway leading to the second floor of one of the buildings; that he, English flashed his light on the defendant and saw the revolver in question lying almost directly under the defendant; that the defendant denied owning the gun; that the witness English observed that the numbers were not on the gun, and that the hammer had been filed off.

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

JACK KILL,

Plaintiff in Error.

287 I.A. 604

Opinion filed June 15, 1938

MR. JUSTICE BRIDGE delivered the opinion of the court.

Jack Kill, the defendant, was arrested September 4, 1931.

at 2:45 o'clock in the morning; was tried in the Criminal Court of Cook County by the court without a jury; was found guilty under two counts of the indictment, convicted and sentenced to one year in the House of Correction upon each count, the sentences to run consecutively.

IV. The first count of the indictment is what is known as

Section 1 of the Unlawful Vehicle Statute, Illinois Revised

Statutes of 1907, Criminal Code, paragraph 121. The second count of

the indictment was a violation of Section 2-4 of the same act found

in paragraph 121.

Officer English, on behalf of the People, testified that

he was a member of the Oak Park Police Department and that on September 4, 1931, he and another officer named Jones were in a patrol car

when they noticed two men get out of a parked automobile and they

intercepted them; that he and the other officer demanded that they

halt; that the two men ran down a passageway in the rear of certain

buildings. The officers followed them and found the defendant lying

on a ladder underneath a stairway leading to the second floor of one

of the buildings; that he, English, flashed his light on the defendant

and saw the revolver in question lying almost directly under the

defendant; that the defendant denied owning the gun; that the witness

English observed that the numbers were not on the gun, and that the

gun was not fired.

Upon the trial a ballistic expert testified that he had examined the revolver, which was an exhibit in the case, and that he found the original serial numbers had been removed, but that underneath a panel in the handle there was an additional number placed there by the manufacturers.

Defendant contends that the evidence is not sufficient to support the count in the indictment charging him with carrying a concealed weapon, on the ground that the weapon was not actually upon his person at the time of his arrest and that it may have been placed where found by some other person.

The case of The People v. Kienoth, 322 Ill. 51, holds that if a firearm is carried in such a manner as to give no notice of its presence or in such proximity of the accused as to be within easy reach, it is sufficient to satisfy the statute. See also Brown v. United States, 30 Fed. (2d) 474.

The proposition advanced that the weapon may have been placed where it was, underneath the body of the defendant by some other person, is highly improbable. The facts are, in our opinion, sufficient to have justified the trial court in finding that the weapon belonged to the defendant and that it must have been upon his person just prior to his arrest. The practice of criminals of throwing away guns just before arrest, in order to create a doubt in the minds of the court and jury, is too well recognized as a regular practice to carry weight with a court, particularly under such circumstances as those in the instant case.

Section 2-A of the Deadly Weapons Act, already referred to, provides that it shall be a criminal offense for any person to change, alter, remove or obliterate the name of the maker, model, manufacturer's number or other mark of identification on any firearm. The same section also provides that the possession of such a firearm with the number or maker's name obliterated shall be prima facie evidence that the alteration or removal of the

Upon the trial a ballistic expert testified that he had examined the revolver, which was an exhibit in the case, and that he found the original serial number had been removed, but that underneath a panel in the handle there was an additional number placed there by the manufacturer.

Defendant contends that the evidence is not sufficient to support the count in the indictment charging him with carrying a concealed weapon, on the ground that the weapon was not actually upon his person at the time of his arrest and that it may have been placed there by some other person.

The case of The People v. Williams, 325 N.Y. 21, holds that if a firearm is carried in such a manner as to give no notice of its presence or in such proximity of the accused as to be within easy reach, it is sufficient to satisfy the statute. See also People v. United States, 30 Fed. (2d) 476.

The prosecution advanced that the weapon may have been placed there by the defendant or by some other person, is highly improbable. The facts are, in our opinion, sufficient to have justified the trial court in finding that the weapon belonged to the defendant and that it must have been upon his person just prior to his arrest. The practice of examining of throwing away guns just before arrest, in order to create a doubt in the minds of the court and jury, is too well recognized as a regular practice to carry weight with a court, particularly under such circumstances as those in the instant case.

Section 8-a of the Penal Law, as amended, already referred to, provides that it shall be a criminal offense for any person to change, alter, remove or obliterate the name of the maker, model, manufacturer's number or other mark of identification on any firearm. The same section also provides that the possession of such a firearm with the number or maker's name obliterated shall

maker's name or number was done by the one in possession of the firearm. This section of the statute is unambiguous and was passed by the legislature for the evident purpose of protecting a system in force whereby such deadly weapons could be traced and identified. The possession of the deadly weapon in question by the defendant created a prima facie case against him under the Act. The fact that there was an additional number upon the revolver, which was disclosed by removing a panel in the handle, is no defense.

Under the statute, the fact that the defendant had possession raises a presumption that the removal of the serial number was done by him. This was done evidently for the purpose of removing the evidence of ownership. The fact that there was another number on the weapon does not relieve him of liability. This fact was, in all probability, unknown to the defendant. The power of the legislature to provide against the removal of serial numbers, where they are intended as a means of identification, is recognized by the Supreme Court of this State in the case of The People v. Billardello, 318 Ill. 124. That case considered the question of the obliteration of the serial numbers upon an automobile and recognized the power of the legislature to enact laws with reference to the protection of such serial numbers on automobiles by providing a penalty in the case of obliteration or removal.

The trial court found the defendants guilty on both counts of the indictment and, for the reasons stated in this opinion, the judgment of the Criminal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

HENRIAN LEWIS, ALEX WACHENBERG and
EDMUND G. ELISNER, Executors of the
Estate of R. Zwick,

Appellees,

vs.

UNIVERSAL CARLOADING & DISTRIBUTING
COMPANY, a Corporation.

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 604

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

R. Zwick brought suit against the Universal Carloading & Distributing Company, a corporation, to recover \$790.34, claiming damages on account of the negligence of the defendant in transporting a certain quantity of iron pipe fittings from St. Louis to Chicago. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for \$456.93 and the defendant appeals.

During the pendency of the suit an order was entered substituting Lewis, Wachenberg and Elisner as executors of the estate of R. Zwick. September 22, 1930, a bill of lading was signed by the defendant, on a blank form of a bill of lading of the New York Central Railroad, which recites that the Railroad company received at St. Louis, Mo., from A. Wolff Corporation, 12 barrels, 9 kegs and 9 sacks of iron pipe fittings consigned to R. Zwick at Chicago, and further recites: "Received *** at St. Louis, Mo., from A. Wolff Corp. the property described below, in apparent good order, except as noted, (contents and condition of contents of packages unknown.)"

Apparently the goods were shipped by automobile truck and there is some slight evidence that the truck en route tipped over,

thereby causing some of the barrels to be broken and some of the bags and sacks to be thrown, so that the iron pipe fittings were somewhat mixed up and some dirt got into them. Within a few days after the pipe fittings were received at St. Louis they were delivered to plaintiff in Chicago. Complaint was made that some of the barrels were broken; that some of the fittings were rusty and that dirt had got into some of the bags or barrels, and a claim was made by plaintiff for \$350.00 for damages on account of this. Afterward plaintiff's claim was increased and upon defendant's refusal to pay this suit followed.

There is some argument in the briefs that since the bill of lading, which is in evidence, stated that the goods had been received in good order at St. Louis, and that they were damaged when they arrived in Chicago, plaintiff made a prima facie case of liability against the defendant. We think that this would not make a prima facie case because the bill of lading recited that the goods were received in "apparent good order" except that the "contents and condition of contents of packages unknown." Obviously the defendant in issuing its bill of lading did not know the condition of the pipe fittings in the barrels, kegs and sacks because it could not see them; and plaintiff, before he could successfully contend that the goods were in good condition when delivered to the carrier in St. Louis, would have to show this by other evidence, which he attempted to do by calling a witness who testified that he had seen the pipe fittings in St. Louis about ten days before they were delivered to the carrier. He describes the pipe fittings as "malleable iron pipe fittings;" that they were "tees, elbows, street elbows, reducers, a variety of fittings." This witness further testified that several days after the goods were received by plaintiff in Chicago he saw the pipe fittings at plaintiff's place of business; that they had "rustled, rust had got in, and

Thereby making some of the barrels to be broken and some of the
 left and some to be broken. In fact the left side of the barrels was
 somewhat mixed up and some left and some right. Within a few days
 after the pipe fittings were received at St. Louis they were de-
 livered to plaintiff in Chicago. Complaint was made that some of
 the barrels were broken; that some of the fittings were rusty and
 that they had got into some of the bags or barrels, and a claim was
 made by plaintiff for \$100.00 in damages on account of same.
 Afterward plaintiff's claim was increased and upon defendant's re-
 fusal to pay this suit followed.

There is some argument in the briefs as to when the bill
 of lading, which is in evidence, stated that the goods had been
 received in good order at St. Louis, and that they were damaged
 when they arrived in Chicago, plaintiff made a claim for loss of
 liability against the defendant. We think that this would not make

a claim for loss of goods and bill of lading. It is true that the
 goods were received in "apparent good order" except that the "con-
 tents and condition of packages unknown." Obviously
 the defendant is issuing the bill of lading and not the con-
 dition of the pipe fittings in the barrels, bags and boxes because
 it could not see them; and plaintiff, before he could successfully
 contend that the goods were in good condition when delivered to the
 carrier in St. Louis, would have to show this by other evidence,
 which he attempted to do by calling a witness who testified that he
 had seen the pipe fittings in St. Louis about ten days before they
 were delivered to the carrier. He described the pipe fittings as
 "small iron pipe fittings;" that they were "new, clean,
 almost smooth, redness, a variety of fittings." This witness
 further testified that several days after the goods were received
 by plaintiff in Chicago he saw the pipe fittings at plaintiff's
 place of business; that they had "rusty, that had not in, and

they were all mixed up, they weren't sorted out."

Other witnesses called by plaintiff testified in substance that the fittings would have been worth from 15 to 20 cents a pound if they had not been damaged and that in the damaged condition they were worth from 3 to 5 cents a pound.

During the trial of the case the learned trial Judge stated that it was obvious that counsel for each side had not properly prepared the case. The court further stated after practically all of the evidence was in, "It is evident that this is one of the most weird cases I have ever listened to, vague, misty, and that applies to both sides too. I never saw a case like this before in my life, never." We think the court was entirely justified in these statements.

We are unable to comprehend how iron pipe fittings could have been materially damaged on account of the truck tipping over with the result as indicated above. The rust that accumulated on the fittings within two or three days must have been slight and the fact that there was some dirt mixed with the fittings and that they were more or less mixed up would warrant only the allowance of a very small sum to compensate the plaintiff. There is no evidence that the rust was occasioned by the tipping of the truck.

Counsel for the defendant complain that the court was prejudiced against the defendant. We have examined the entire record in this case and are clearly of the opinion that such contention is wholly unwarranted. A great many frivolous objections were made by counsel for both sides. Instead of letting the witnesses tell their story so that the court could get some idea of the facts, there were almost constant objections, most of them being wholly without merit and the court was warranted in brushing them aside in an endeavor to learn what the merits of the controversy were.

The judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Hatchett, JJ., concur.

that the things would have been there in the same condition they were when they were first taken out of the house. It was not until after the trial that I learned from Judge Smith that it was obvious that counsel for each side had not properly prepared the case. The court had been misled after practically all of the evidence was in. "It is evident that this is one of the cases where I have not listened to what was said, and that applies to both sides too. I never saw a case like this before in my life, never." He said the court was entirely justified in these statements.

We are unable to comprehend how from the things said have been so seriously damaged in regard to the law. We are unable to comprehend how the court was misled. The fact that the court was misled on the things which two or three days have been said and the fact that there was some thing said with the things and that they were not at all what we would expect only the allowance of a very small one to compensate the plaintiff. There is no evidence that the fact was established by the things of the court.

Comment for the defendant counsel that the court was misled along against the defendant. We have examined the entire record in this case and the clarity of the opinion that was rendered is wholly unimpaired. A great many of the objections were made by counsel for both sides. Instead of letting the witnesses tell their story as far as the court could get from them at the time, there were almost constant objections, most of them being wholly without merit and the court was misled in reaching their verdict in an entirely different way. The court was misled in reaching their verdict and the

THE COURT OF THE UNITED STATES IN REVEREND JAMES M. HAYWARD AND HENRY HAYWARD.

35812

GEORGE A. NANNES,
Appellee,

vs.

THOMAS H. DELIGIANES,
Appellant.

337
APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

267 I.A. 804

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff, the payee of a promissory note, caused judgment to be entered against the defendant, the maker, for the face of the note, interest and attorney's fees, totalling \$300.28. Afterward, on motion of the defendant, the judgment was opened up and he was given leave to defend.

The defense interposed was that the defendant had paid the note. The defendant also filed a plea of set-off claiming \$531.25, being three payments made by him to the plaintiff aggregating \$425, which plaintiff was to turn over to an insurance company in payment of defendant's premiums, but that the plaintiff failed to do so. The balance of the set-off was made up of interest.

There was a trial by the court without a jury, and a finding in favor of the plaintiff that on the day of the confession of judgment there was due from the defendant \$300.28 and a further finding against the defendant on his set-off. Judgment was entered on the finding and the defendant appeals.

A great deal is said in the briefs and a number of propositions of law are made, supported by a number of authorities, as to what is the proper procedure where a judgment by confession has been opened up, none of which has any bearing on the situation before us because the plaintiff introduced the note which made a prima facie case, and the defendant later testified that he signed the note. The defendant and a witness testified that on September 9, 1925, defendant paid plaintiff the face of the note in controversy in

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Plaintiff, the party of a preliminary note, caused judgment to be entered against the defendant, the party, for the loss of the note, interest and attorney's fees, totaling \$100.00. Defendant, on motion of the defendant, the judgment was entered on and he was given leave to defend.

The defense introduced was that the defendant had paid the note. The defendant also filed a plea of set-off claiming \$100.00, being three separate notes by him to the plaintiff aggregating \$100.00 when plaintiff was to turn over to an insurance company in payment of defendant's premiums, but that the plaintiff failed to do so. The balance of the set-off was made up of interest.

There was a trial by the court without a jury, and a finding in favor of the plaintiff and on the day of the conclusion of judgment there was an order for defendant \$100.00 and a further finding against the defendant on his set-off. Judgment was entered on the finding and the defendant appeals.

A great deal is said in the briefs and a number of proposals along of law are made, supported by a number of authorities, and as what is the proper procedure where a judgment by confession has been entered up, none of which has any bearing on the decision before us. Hence the plaintiff introduced the note with a plea of set-off, and the defendant introduced the note with a plea of set-off. The defendant and a witness testified that on September 2, 1932, the defendant paid plaintiff the sum of \$100.00 and the plaintiff introduced the note with a plea of set-off.

currency, but that plaintiff did not have the note but promised to send it to him later on. Another witness, called by defendant, testified that on a later date he heard the defendant ask plaintiff why the note had not been returned and the plaintiff said he would look for the note and either return it or send him a receipt. Plaintiff denied that he had been paid any currency by the defendant for the note.

The court found in favor of the plaintiff on this issue and without detailing the evidence we are clearly of the opinion that the court was warranted in this finding. It is certain that we would not be warranted in overturning the finding of the court, who saw and heard the witnesses, on the ground that it was against the manifest weight of the evidence. There was also conflict in the evidence in connection with defendant's set-off. Some of the payments made by the defendant were admitted by plaintiff and the evidence was to the effect that he had turned this money over to the insurance company. All of the questions for the court to decide were questions of fact, and we think his finding was warranted by the evidence.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

emergency, but that plaintiff did not know the note and promised
to send it to him later on. Another witness, called by defend-
ant, testified that on a later date he heard the defendant say
plaintiff why the note had not been returned and the plaintiff
said he would look for the note and either return it or send
him a receipt. Plaintiff denied that he had been paid any mone-
y by the defendant for the note.

The court found in favor of the plaintiff on this issue
and without detailing the evidence we give briefly of the opinion
that the court was warranted in this finding. It is certain that
we would not be warranted in overturning the finding of the court,
who saw and heard the witnesses, on the ground that it was against
the manifest weight of the evidence. There was also testified in
the evidence in connection with defendant's testimony. Some of
the payments made by the defendant were admitted by plaintiff and
the evidence was to the effect that he had turned into money over
to the insurance company. All of the possession for the court is
facts were questions of fact, and we think the finding was
warranted by the evidence.

The judgment of the municipal court of Chicago is affirmed.
JUDGMENT AFFIRMED.

McClure and Ketchum, J., concur.

35374

JOSEPH GENOVESE,
Appellant,

vs.

NICHOLAS LEIDINGER,
Appellee.

34
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

267 I.A. 604

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages for personal injuries claimed to have been sustained by him through the negligence of the defendant in driving his automobile against plaintiff's wagon. There was a jury trial and a verdict and judgment in defendant's favor and plaintiff appeals.

The record discloses that about seven o'clock on the evening of November 9, 1930, plaintiff was driving his team and wagon north in Halsted street, some distance south of Harvey, Illinois, which is located south of Chicago. At this place Halsted street runs through the country and there were no street lights. The roadway was concrete and there were four lanes for traffic, two for southbound and two for northbound traffic. Plaintiff was a farmer about 35 years old, and on the day before the accident had been plowing for another farmer near Beecher, Illinois, which is some sixteen miles south of Homewood, where plaintiff lived. Plaintiff left his plow at the farm near Beecher and the next morning, Sunday, he hitched his team to the wagon and drove out to get his plow. He put the plow in the wagon with the handles turned toward the rear and attached a lantern to the round between the plow handles. Between one and two o'clock in the afternoon he started home, driving north on Halsted street, and at the time of the accident he was about four miles south of Harvey. He was driving his team and wagon straddling the pavement between the two northbound traffic lanes.

ALABAMA
JANUARY 1, 1930

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ALABAMA
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MR. J. L. HARRIS, JR., ATTORNEY AT LAW, MOBILE, ALA.

RE: ALABAMA

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The defendant was driving a six-cylinder Durant automobile going about 25 miles an hour and traveling in the east lane of Halsted street. His brother was riding with him. They testified that they were looking ahead but did not see the farm wagon until just before the collision; that when defendant saw the wagon he turned to the right in an attempt to avoid a collision but was unable to do so. The west side of the automobile struck the east part of the wagon, smashing it, throwing plaintiff forward, and the horses became frightened and ran away with part of the wagon hitched to them. The evidence is further to the effect that defendant and his brother got out of the automobile to see if plaintiff was injured and the plaintiff endeavored to overtake his horses; that later the defendant and his brother drove north toward Harvey intending to go to the police station at that town to report the accident, defendant being acquainted with a Harvey policeman; that when they were about two blocks from the police station, which was some four miles from the place of the accident, they were stopped by two policemen who had followed them in an automobile north in Halsted from the place of the accident, and went back with the two policemen to the place of the accident and looked over the situation and were then taken to the police station. Plaintiff recovered his horses. His nephew came to the scene of the accident in search of him and took him to the hospital.

The evidence is uncertain as to whether the lantern on the plow was lighted at the time of the accident. Plaintiff testified that he tied "the red light, the red lantern" to the plow at the back of the wagon. "Q. And did you have any other lights on your wagon? A. Yes, I had a flash light." He testified that ten or fifteen minutes after the accident, after he got his horses, he went back to the wagon which was smashed, and the lantern was still on the plow and was lighted. Objection to this question and answer

The defendant was driving a six-cylinder Buick automobile
going about 15 miles an hour and traveling in the west lane of
related street. His brother was riding with him. They testified
that they were looking ahead but did not see the farm wagon until
just before the collision; that when defendant saw the wagon he
turned to the right in an attempt to avoid a collision but was un-
able to do so. The west side of the automobile struck the east part
of the wagon, smashing it, throwing plaintiff forward, and the
horses became frightened and ran away with part of the wagon behind
him. The evidence is further to the effect that defendant and
his brother got out of the automobile as soon as plaintiff was in-
jured and the plaintiff answered to examine his horses; that
later the defendant and his brother drove north toward Harvey in-
tending to go to the police station at that town to report the ac-
cident, defendant being accompanied with a Harvey policeman; that
when they were about two blocks from the police station, which was
some four miles from the place of the accident, they were stopped
by two policemen who had followed them in an auto-bus north in
related from the place of the accident, and went back with the two
policemen to the place of the accident and looked over the situa-
tion and were then taken to the police station. Plaintiff recovered
his horses. His nephew came to the scene of the accident in search
of him and took him to the hospital.

The evidence is uncertain as to whether the lantern on the
glow was lighted at the time of the accident. Plaintiff testified
that he tied "the red light, the red lantern" to the glow at the
back of the wagon. "I had all you have any other lights on your
wagon? Yes, I had a green light." He testified that he
or fifteen minutes after the accident, after he got his horses, he
went back to the wagon which was smashed, and the lantern was still

was made by counsel for the defendant on the ground that the answer tended to show the condition of the lantern about a half hour after the accident. Objection was overruled. On plaintiff's redirect examination he was asked by counsel: "When did you light the lantern?" Objections to this question were sustained as being bad in form. Plaintiff was then asked: "Who lit the lantern?" and answered, "I did." Objection was made and the court said, "I think the place and time ought to be before or after; *** the question is not proper in form." There was other testimony on this question to the effect that some time after the accident when some of the debris had been removed to the west side of the pavement, the lantern was on the west side of the pavement and was lit at that time. Defendant and his brother testified that they saw no lantern on the wagon prior to or at the time of the accident; that their eyesight was good. The evidence is further to the effect that plaintiff left Beecher to return to his home with the plow on the wagon between one and two o'clock in the afternoon, and he testified he did not get out of his wagon from the time he left Beecher until the accident; that he had traveled about ten miles and it was then dark.

Plaintiff contends that the verdict and judgment are against the manifest weight of the evidence and that there was no evidence tending to show that plaintiff was guilty of contributory negligence. We think both of these questions were for the jury. And upon a careful examination and consideration of all the evidence in the record we are unable to say that the finding, in favor of the defendant, is manifestly against the weight of the evidence. The evidence is to the effect that plaintiff was driving his team partly on each of the two northbound traffic lanes. There is some doubt as to whether the lantern was lighted at the time. It would be strange if plaintiff had lit the lantern when he left Beecher,

was made by counsel for the defendant on the ground that the answer
tended to show the location of the lantern about a half hour after
the accident. Objection was overruled. On Plaintiff's redisc-

examination he was asked by counsel: "Then did you light the
lantern?" Objection to this question was sustained as being bad
in form. Plaintiff was then asked: "When did the lantern go out
and was it lit?" Objection was made and the court said, "I think
the place and time ought to be before or after; ... the question
is not proper in form." There was other testimony on this ques-
tion to the effect that some time after the accident when some of
the debris had been removed to the west side of the pavement,
the lantern was on the west side of the pavement and was lit at
that time. Defendant and his brother testified that they saw no
lantern on the wagon prior to or at the time of the accident; that
their recollection was good. The evidence is further to the effect
that Plaintiff left Beacon to return to his home after the fire
on the wagon between one and two o'clock in the afternoon, and he
testified he did not get out of his wagon from the time he left
Beacon until the accident; that he had traveled about ten miles
and is not tired.

Plaintiff contends that the verdict and judgment are against
the weight of the evidence and that there was no evidence
tending to show that Plaintiff was guilty of contributory negli-
gence. We think both of these questions were for the jury. And
upon a careful examination and consideration of all the evidence
in the record we are unable to say that the finding, in favor of
the defendant, is manifestly against the weight of the evidence.
The evidence is to the effect that Plaintiff was driving his team
partly on each of the two northbound tracks. There is some
evidence as to whether the lantern was lighted at the time. It would
be viewed if Plaintiff had lit the lantern when he left Beacon.

shortly after one o'clock in the afternoon, and his testimony might indicate that he did not do so after that time. Moreover, the uncontradicted evidence is that the defendant was driving his automobile in the east lane, the proper place, and at a reasonable rate of speed, about twenty-five miles an hour; that he had his bright headlights on and could see for a distance of from between one-half block to a block; that just before the accident the driver of a southbound automobile had turned down his bright lights and defendant did likewise, as the law required; that immediately thereafter the accident occurred. The statute (sec. 40, chap. 95a., p. 1933, Cahill's 1931 statutes) providing that a person operating a motor vehicle shall, on overtaking a team of horses, pass on the left side, does not apply here because the defendant was not endeavoring to pass the team and wagon; he did not see them until a moment before the collision, when he endeavored to avoid striking the wagon by turning to the right, which appears to have been the only normal thing he could do considering the fact that the wagon was traveling partly on the two northbound traffic lanes. We think the question whether plaintiff or defendant, or either of them, was guilty of negligence was a proper one for the jury and we are unable to say that the jury's finding is against the manifest weight of the evidence.

Complaint is also made that the court gave erroneous instructions at the request of defendant. The instructions complained of are numbered 6, 9, 10 and 16.

By instruction 6 the jury was told that one of the defenses relied upon was that of "contributory negligence," and these words were then defined; and it further stated that if the jury believed the plaintiff failed to exercise ordinary care for his own safety, which proximately contributed to bring about the accident, the verdict should be for the defendant, and the word "proximately"

was also defined. It is said this instruction was bad because there was no evidence of any contributory negligence on the part of plaintiff; and further, that it did not apply to the count of the declaration which charged wilful and wanton conduct on the part of the defendant. What we have said disposes of the first objection, and we think it also appears that the evidence was entirely insufficient to show any wilful or wanton conduct of the defendant. Waldren Express Co. v. Brug, 291 Ill. 472. In that case it was said that what degree of negligence the law considered equal to a "wilful or wanton act is as hard to define as negligence itself;" that as a general proposition the question of negligence or contributory negligence is one of fact for the jury. But there are cases where such questions become questions of law for the court. Kelly v. Chicago City Ry. Co., 283 Ill. 640, and Louthan v. City Ry., 198 Ill. App. 329. In the instant case we think it clear that the conduct of the defendant in driving his automobile, as disclosed by the evidence, did not tend to show such a gross want of care as indicated a wilful disregard of consequences to others. In these circumstances, we think the instruction, which in effect eliminated the wilful and wanton charge in the declaration, was proper.

What we have said in regard to instruction No. 6 is in substance applicable to instruction No. 9.

Instruction No. 10 told the jury that by the words, "ordinary care and caution," when used in the instructions with respect to the duty of plaintiff, meant that degree of care and caution which "a person of ordinary prudence of the same age, intelligence, experience, capacity and ability to understand and comprehend dangers as the plaintiff, would have exercised under the same or similar circumstances." The objection to this instruction is that it is proper to give such instruction only in a minor's case. We think this contention is sound, but we are unable to see how such

an instruction could have prejudicially affected plaintiff, a man fifty-five years of age, who would be held to be guilty of negligence where a minor might not be found guilty of negligence. The instruction was more favorable to the plaintiff than the law warranted.

Instruction No. 16 is as follows: "If you believe from the evidence that due care on the part of the plaintiff required him to have at least one lighted lamp which shall be so situated as to throw a red light visible in the reverse direction from which he was going, and you believe that the evidence discloses that he did fail to exhibit said light the failure of the plaintiff to exhibit such a light caused or proximately contributed to the happening of the accident, and that the defendant on or before the happening of the accident did all he could in the exercise of ordinary care and caution to avoid striking the vehicle of the plaintiff, as soon as it became apparent to the defendant that the said vehicle was in a place of danger, then your verdict should be for the defendant." The objection to this instruction, as stated by plaintiff's counsel, is that "It has never been held to be negligence per se to drive a vehicle with a tail light unlighted. McDermott v. McKeown Trans. Co., 263 Ill. App. 325." We think this statement is in accordance with the law. If plaintiff had lighted his lantern and the lantern was in good condition but for some unknown reason suddenly went out shortly before the accident, plaintiff would not be guilty of negligence in failing to have the lantern lit, but if the failure of the lantern to be lit proximately contributed to bring about the collision, this might relieve the defendant from liability in the absence of any wanton conduct on his part. The injuries would be the result of a pure accident. But the main complaint made against this instruction is that the jury was told that if the defendant "on or before the happening of

an instruction which was substantially identical to that
of the jury at the trial. The only difference was that
it was a minor change and not a change of substance. The
instruction was more favorable to the plaintiff than the law was.

Page 2.

Instruction No. 10 is as follows: "If you believe from
the evidence that the only act of the plaintiff required
him to have at least one lighted lamp which would be so placed
as to show a red light visible to the oncoming traffic from
the rear, and you believe that the evidence discloses that he
did fail to exhibit said light the failure of the plaintiff to ex-
hibit such a light caused or proximately caused to the hap-
pening of the accident, and that the defendant or his driver the
negligence of the accident did all he could in the exercise of or-
dinary care and caution to avoid striking the vehicle of the

plaintiff, as soon as it became apparent to the defendant that the
said vehicle was in a place of danger, then such verdict should be
for the defendant." The objection to this instruction, as stated
by plaintiff's counsel, is that "it has never been held to be ne-
gligent for a driver to strike a vehicle with a red light displayed."

McKinnon v. McKinnon, 100 Cal. 444, 34 P. 2d 101. No other

case is cited in support of this. It is claimed that
lighted his lantern and the lantern was in good condition but for
some unknown reason suddenly went out shortly before the accident,
plaintiff would not be guilty of negligence in failing to have the
lantern lit, but if the failure of the lantern to be lit prox-

imately contributed to the accident, this would be a
factor in determining liability in the absence of any other evidence
as to fault. The instruction would be the result of a mere accident.
But the main complaint made against this instruction is that the
jury was told that if the defendant "in or before the happening of

the accident" did all that he could do to prevent the collision as soon as it became apparent to him that the wagon was in a place of danger, then their verdict should be for the defendant. It is said that this limited the time within which the defendant should be in the exercise of due care to the moment before it became apparent to the defendant that there was to be a collision, and that under the law defendant was required to be in the exercise of due care prior to and at the time of the collision. We think the contention is sound. Novitsky v. Knickerbocker Ice Co., 276 Ill. 100. This objection to the instruction seems to be conceded by counsel for defendant to be well founded, but they say that under the instruction the defendant was entitled to a verdict without showing that he was in the exercise of ordinary care at and before the time of the accident, the contention being that defendant was entitled to a verdict in his favor if the jury believed from the evidence that plaintiff was not in the exercise of due care for his own safety because he did not have a lighted lamp as required by law, provided they further believed that such failure proximately contributed to the accident and that the additional requirement that it must also appear from the evidence that the defendant was in the exercise of due care as soon as it became apparent to him that there was to be a collision, added another ground that the law did not require, before the verdict should be for the defendant.

At the time of the accident the plaintiff was required to carry a red light which would show from the rear of his wagon. Sec. 164, chap. 121, p. 2459, Cahill's 1931 Statutes. If the jury believed he did not have such a light, plaintiff would be violating the statute and prima facie this would show he was guilty of negligence, and if the jury believed the failure of plaintiff to have such lamp proximately contributed to the accident, we hold plaintiff could not recover, since there was no evidence of wanton and wilful

conduct on the part of the defendant. While the instruction is erroneous, we think it was not prejudicial to plaintiff.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

OUTSIDE OF THE CITY OF NEW YORK AND IN THE COUNTY OF NEW YORK.

THAT THE SAID DEED WAS EXECUTED AND DELIVERED BY THE SAID PARTIES.

IN WITNESS WHEREOF, I HAVE HEREunto set my hand and the seal of the said Court at the City of New York, this 1st day of January, 1900.

CLERK OF THE COURT.

WITNESSES:

JOHN J. HENRY, Clerk of the Court, and JAMES J. HENRY, Clerk of the Court.

35882

JOHN D. WEBBER,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY
et al.,

Appellants.

35
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

267 I.A. 605'

MR. JUSTICE McSABLY DELIVERED THE OPINION OF THE COURT.

Plaintiff while a passenger on one of defendants' street cars was injured through a collision with a truck. Upon bringing suit for damages he had a verdict against the defendants for \$20,000. They appeal from the judgment.

The accident happened on the morning of November 6, 1926, at the intersection of Grand avenue, which runs eastward, and Paulina street, which runs northward, in Chicago. The street car was going eastward on Grand avenue and plaintiff was riding upon the rear step on the right hand side. While the car was crossing Paulina a truck coming northward on Paulina threatened to collide with the street car at the intersection, and in order to avoid this the driver turned his truck eastward into Grand avenue alongside the street car; its rear wheels struck the curb on Paulina, stopping it; its front bumper did not clear the rear step of the passing car on which plaintiff was standing but struck plaintiff's legs, causing severe injuries.

The question presented is whether, as plaintiff argues, both the motorman of the street car and the driver of the truck were guilty of negligence causing the accident, or, as claimed by defendants, the negligence was solely that of the driver of the truck. Defendants also contend that plaintiff was guilty of contributory negligence in riding upon the rear step.

The street car in question is the ordinary car, about 49 feet long, with a vestibule platform at either end; the right hand

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The student involved in the matter of January 4, 1968, was advised that the payment of \$25,000.00 was required for the purchase of the vehicle. The student involved in the matter of January 4, 1968, was advised that the payment of \$25,000.00 was required for the purchase of the vehicle.

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The question presented is whether, as plaintiff alleges, both the negligence of the driver and the driver of the truck were guilty of negligence causing the accident, or, as claimed by defendant, the negligence was solely that of the driver of the truck. Defendant also contends that plaintiff was guilty of contributory negligence in riding upon the rear step.

rear door was open with the step, upon which plaintiff was standing, down. The car had stopped about 170 feet west of the west building line of Paulina street; it then proceeded eastward to cross Paulina, at which street cars do not stop to receive or discharge passengers. The truck involved in the collision was a two and a half ton General Motors truck about 18 feet in length, owned and operated by a Mr. Growcock of South Bend, Indiana, who was engaged in the trucking business with a terminal in Chicago.

On the day of the accident a truck driver, Oden Wolf, employed by Mr. Growcock, drove a White truck from South Bend to the General Motors service station on Pershing Road in Chicago with a load of box motors weighing approximately five and a half tons; at the service station this load was transferred from the White truck to the smaller truck in question, and Wolf started with this load for Evanston. It seems to be conceded that this truck was greatly overloaded. Wolf said it was "almost doubly overloaded." Also there is no substantial denial that the brakes were out of order. A police officer who interviewed Wolf after the accident testified that Wolf said that he had a very heavy load "and that he knew the brakes would not hold it."

The truck was going north on Paulina near the right hand side of the street. Wolf says that when the front end of his truck was at the south building line of Grand avenue he saw the street car for the first time, and that its front end was around 70 or 75 feet west of Paulina street; that he thought the street car was moving a little faster than five miles an hour while his truck was going 18 or 20 miles an hour. If this was a correct statement of the facts, it is apparent that if Wolf had continued northward he would have had ample time to cross Grand avenue without incurring any danger of being struck by the eastbound car. Much more reasonable was the testimony of Walter Svec, an experienced driver, who was at the same time driving a truck north on Paulina

then door was open with the key, upon which plaintiff was standing.
Some. The car had stopped about 175 feet west of the west building line of building street; it then proceeded eastward to street
building, at which point car was not stop to receive or discharge
passenger. The truck involved in the collision was a two and a
half ton General Motors truck about 15 feet in length, owned and
operated by a Mr. Stowess of South Bend, Indiana, who was employed
in the trucking business with a branch in Chicago.

On the day of the accident a James Driver, Urban Wolf, em-
ployed by Mr. Stowess, drove a white truck from South Bend to the
General Motors service station on Washington Road in Chicago with a
load of two boxes weighing approximately 1500 lbs. and a 1937 Ford
the service station also load was transferred from the white truck
to the smaller truck in question, and Wolf started with this load
for Washington. It seems to be conceded that this load was greatly
overloaded. Wolf said it was "almost totally overloaded." Also,
there is no substantial denial that the boxes were not in order,
a police officer who interviewed Wolf after the accident testified
that Wolf said that he had a very heavy load "and that he knew the
boxes were not over 1500 lbs."

The truck was going north on building street the right hand
side of the street. Wolf says that when the truck was at his truck
was at the south building line of street where he saw the other
car for the first time, and that the truck was about 70 or 75
feet west of building street; that he thought the driver of the
other car was a 1937 Ford from the fact that he saw the front end
being 15 or 20 inches in front. It was a correct statement of
the facts, it is admitted that if Wolf had continued northward
he would have had ample time to stop and avoid collision with
the other car if he had been alerted by the collision car. Such were
the facts and the testimony of James Driver, an experienced

street towards Grand avenue alongside of Wolf's truck; he was a little ahead of Wolf's truck, but when about 100 feet south of Grand avenue Wolf's truck passed him on the right going about 20 or 22 miles an hour; when Evec was about 110 feet south of Grand avenue he saw the street car going eastward on Grand avenue across Paulina; Wolf's truck kept going right on after it passed Evec's truck without slowing speed, but when it got to Grand avenue made a turn with the front end of this truck to the east in Grand avenue and the hind wheels hit up against the curbstone on Paulina, which stopped the truck with a sudden jar, making a loud crash. Evec says that the street car had gotten by Paulina before he, Evec, got to Grand avenue; that the gong on the street car was sounded all the time while it was crossing Paulina.

Other witnesses gave testimony to the effect that the front or east end of the street car was well over the east crosswalk of Paulina when the truck turned eastward. One witness testified that the front end of the truck got to the street car track almost at the same time that the rear of the street car passed that point. Another witness says the street car was partly past Paulina as the truck turned east on Grand. Another witness who was driving his automobile east on Grand following the street car, testified that when the truck was stopped it was not over an inch and a half from the riser or "kick plate" of the rear step of the street car; that the front of the street car nearest to the truck at any time was nearly the entire length of the street car from the truck, and that the car had passed the truck before it (the truck) "got up to it." A passenger on the rear end of this street car testified that the bumper of the truck hit the street car from the side; that when he first saw the truck it was about five or six feet away from the street car and that at this time about two thirds of the length of the street car was past the truck.

street between Grand Avenue and Grand Avenue, about 100 feet south of
 Little Street of Wolf's track, but when about 100 feet south of
 Grand Avenue Wolf's track passed him on the right being about 20
 or 25 feet in front; when there was about 100 feet south of Grand
 Avenue he and the street car going eastward on Grand Avenue passed
 Hamilton; Wolf's track kept going right on after it passed Grand
 Avenue without slowing speed, but when it got to Grand Avenue made
 a turn with the front end of this truck to the east in Grand Avenue
 and the line wheels hit up against the curbstone on Hamilton, which
 stopped the truck with a sudden jar, making a loud crash. Wolf
 says that the street car had passed by Hamilton before he saw
 got to Grand Avenue; that the car was going on the street car was rounded
 all the time while it was passing Hamilton.
 Other witnesses gave testimony to the effect that the front
 of each end of the street car was well over the east curbstone at
 Hamilton when the truck turned eastward. One witness testified that
 the front end of the truck got to the street car track almost at
 the same time that the rear of the street car passed that point.
 Another witness says the street car was partly past Hamilton as the
 truck turned east on Grand. Another witness who was driving his
 automobile east on Grand testified the street car, Hamilton, that
 when the truck was stopped it was not over an inch and a half from
 the rear of "Yellow Glass" at the rear end of the street car; that
 the front of the street car was not at the truck at any time was
 nearly the entire length of the street car from the front, and that
 the car had passed the truck before it (the truck) "got up to 10."
 A passenger on the rear end of this street car testified that the
 bumper of the truck hit the street car from the side; that when he
 first saw the truck it was about 150 or 200 feet away from the
 street car and that at this time about two-thirds of the length of
 the street car was past the truck.

The motorman testified that as he came towards Paulina street he saw the two trucks (evidently those driven by Evec and Wolf respectively) coming north on Paulina about 125 feet away from Grand avenue; that he rang the bell as he crossed the street; that he judged the approaching trucks were going about fifteen miles an hour; that they seemed to be coming "side by side;" that the last time he saw them he judged they were somewhere about 110 feet south of Grand avenue; that the first he knew of an accident was when he received the emergency bell; that at this time the front of his car was about 75 feet east of Paulina street.

We are of the opinion, after considering the various conflicting bits of testimony, that the decided preponderance of the evidence shows that the sole cause of the accident was the overweighted truck of Wolf, going at a good rate of speed, with brakes so out of order that he was unable to control it so that the street car might pass without a collision.

Counsel in his brief concedes that Wolf was negligent and it is in evidence that a suit has been brought on behalf of plaintiff against Mr. Growcock, the owner of the truck, to recover damages growing out of this accident. But it is argued that the motorman was also negligent in failing to keep a proper lookout for vehicles at the street intersection in order to avoid a collision, and therefore he was negligent in failing to do all within the range of human vigilance and foresight to avoid an accident. Undoubtedly this degree of care is required in motormen of vehicles carrying passengers for hire. But a motorman is not required to be on guard against the unexpected or against circumstances of which in the exercise of the highest degree of care, he could not know. The motorman in question had no means of knowing and could not have known that the truck driven by Wolf was carrying a weight of nearly twice as much as it was designed to carry, nor that the

The witness testified that as he came toward the building
he saw the two men (evidently those shown by the
photograph) coming north on Franklin Street, 100 feet away from
Grand Avenue; that he rang the bell as he crossed the street; that
he judged the accompanying person was going toward the west when he
heard; that they seemed to be coming "side by side"; that the last
time he saw them he judged they were somewhere about 100 feet south
of Grand Avenue; that the time he knew of an accident was when he
received the emergency call; that at this time the front of the
car was about 75 feet east of Franklin Street.

At the time witness, after mentioning the accident, was
talking to the jury, that the accident happened at the
evidence shows that the car was of the make of the car
which was in the street at the time of the accident, and that
he was out of sight when he saw the car. He was not in the street
earliest part of the accident.

Witness in his brief statement that he saw the accident and
it is in evidence that a car had been stopped on Franklin Street
at the time of the accident, the fact is that the car was
not stopped out of the accident. But it is shown that the
motorist was also negligent in failing to keep a proper lookout
for vehicles at the street intersection in order to avoid a col-
lision, and therefore he was negligent in failing to do all within
the range of human vigilance and foresight to avoid an accident.
Accordingly this degree of care is required in motorist in vehicle
carrying passengers for hire. But a motorist is not required to be
on guard against the possibility of a car accident at night
in the exercise of the highest degree of care, as a rule not known.
The motorist in question had no means of knowing and could not
have known that the car was carrying a vehicle at
night when he was on it was negligent in doing so, and that the

truck was operated with brakes so defective that they would not hold. He was not required to stop his car in anticipation that an overloaded truck with defective brakes could not be controlled as it approached the street intersection.

Defendant argues that plaintiff was guilty of contributory negligence in riding upon the rear step. The street car and rear platform were crowded. Plaintiff testified that the crowd on the rear platform was pushing and shoving and he found it necessary to go onto the step so he could hold onto the grab-iron on the side of the car. Under such circumstances, whether riding on the step is contributory negligence is a question of fact to be determined by the jury. Consolidated Traction Co. v. Schritter, 222 Ill. 364; Petersen v. E. A. & E. T. Co., 238 Ill. 403; Nath v. Chicago City Ry. Co., 243 Ill. 114.

Defendants argue that from his position of danger plaintiff was obligated to use his powers of observation and should have given attention to his surroundings, because to avoid danger under such circumstances greater precautions were necessary than would be required were he occupying a seat in comparative safety; that plaintiff should have seen the danger of the approaching truck in time to have permitted him to step up on the platform and thus avoid being struck. Plaintiff says that he was facing outward as he stood on the step, not looking at anything in particular; that he vaguely remembers seeing a truck about 10 or 12 feet away, but saw it positively when it was about three feet away, and it was only a "split second" thereafter when he was struck.

There is force in this point, but we are not disposed to hold that under all the circumstances presented the jury was manifestly wrong in finding that plaintiff was not guilty of contributory negligence.

However, the conduct of the plaintiff and his failure to see the truck in time to avoid being struck, is a very potent reason for

There was a crowd of people on the sidewalk and in the street. The crowd was not very large, but it was noticeable. The people were of various ages and were dressed in the style of the early 20th century. The street was paved with cobblestones and there were some small shops and buildings on the corner. The weather was clear and the sun was shining. The crowd was moving slowly and there was a lot of talking and laughing. The people seemed to be enjoying themselves. The street was very clean and there were no signs of poverty or crime. The buildings were well-maintained and the overall atmosphere was one of a peaceful and prosperous community.

exonerating the motorman from the charge of negligence. If the plaintiff, who had an unobstructed view of the truck, was not guilty of negligence in failing to observe it, how then could it be said that the motorman, at the other end of the car, standing in an inclosed vestibule with the front end of the car advancing across the east crosswalk, was guilty of negligence in failing to see the truck so as to avoid the accident.

Two instructions given on behalf of the plaintiff are criticised; the first (No. 8) is as follows:

"If you believe from the evidence that any witness in this case has knowingly and wilfully sworn falsely on this trial to any matter material to the issues in this case, then you are at liberty to disregard the entire testimony of such witness, except in so far as it has been corroborated by other credible evidence or by facts and circumstances appearing in evidence."

The criticism is directed against the words "or by facts and circumstances appearing in evidence." Facts and circumstances "appearing in evidence" include all facts and circumstances, however unbelievable. The instruction might properly read, "facts and circumstances proved on the trial," or, "credible facts and circumstances appearing in evidence." Every statement by every witness appears in evidence, whether credible or incredible. We think the instruction improper in this respect. People v. Puraley, 302 Ill. 62.

Plaintiff's given instruction No. 9 reads:

"While the law does not make a common carrier an insurer of the safety of its passengers, that fact does not in the slightest degree relieve such carrier of its legal duty to exercise the highest degree of care for the safety of its passengers, having in view the character and mode of conveyance and consistent with the practical operation of the vehicle."

A carrier is not an insurer of the safety of the passenger, and this is a limitation on the rule of highest degree of care. By the use of the words in the instruction, "in the slightest degree," the jury would be encouraged to extend the rule requiring the highest degree of care beyond the limitation of the non-insurer rule. The words criticised tend to negative the non-insurer rule. This

transferring the evidence from the theory of negligence. It is
evident, who has an unobstructed view of the road, was not
likely to neglect in failing to observe it, how often would it
be said that the defendant, at the same end of the way, standing in
a limited visibility with the front end of the car advancing across
the road crosswalk, was guilty of negligence in failing to see the
truck as he went into the accident.

Two instructions given on behalf of the plaintiff are

misleading; the first (No. 8) is as follows:

"If you believe from the evidence that any witness in this
case has been misled or deceived by any statement made by any
other witness in this case, then you are to dis-
regard the entire testimony of such witness, except in
so far as it has been corroborated by other credible evidence or
by facts and circumstances appearing in evidence."

The criticism is directed against the words "or by facts

and circumstances appearing in evidence." Words and circumstances

appearing in evidence" include all facts and circumstances, however

unbelievable. The instruction might properly read, "facts and cir-

cumstances proved on the trial," or, "credible facts and circum-

stances appearing in evidence." Every statement by every witness

appears in evidence, whether credible or incredible. We think the

instruction language is quite correct. People v. Parker, 208 Ill. 62.

Instruction No. 9 reads:

"While the law does not make a common carrier an insurer
of the safety of its passengers, and that fact is to be kept in
mind by the jury, it is the duty of the jury to consider the whole
of the evidence of the safety of its passengers, having in view
the character and mode of transportation and consistent with the
usual operation of the vehicle."

A carrier is not an insurer of the safety of its passengers,

and this is a limitation on the rule of highest degree of care. By

the use of the words in the instruction, "in the highest degree,"

the jury would be encouraged to extend the rule regarding the

highest degree of care beyond the limitation of the non-insurer rule.

instruction is improper and should not have been given.

There have been two trials in this case. In both the verdicts were for the plaintiff, and it is argued that this should cause the reviewing court to be reluctant to reverse, citing Blackhurst v. James, 304 Ill. 536. In that case, however, there were two verdicts with two Judges approving. In the instant case the verdict in the first trial was set aside, so that it comes to this court as upon the first review.

After considering the entire record, we are of the opinion that the verdict finding the defendants guilty is manifestly against the weight of the evidence; that the circumstances clearly exonerate the motorman of defendants' car from the charge of negligence. The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Hatchett, J., concur.

instruction is improper and should not have been given.
There have been two trials in this case. In both the ver-
dicts were for the plaintiff, and it is argued that this should
show the necessity of the defendant to reverse, citing
McDonald v. Jones, 200 Ill. 586. In that case, however, there
were two verdicts for the plaintiff, and the defendant was
the verdict in the first trial was not taken, so that it came to
this court as a new trial.
After considering the facts, we are of the opinion
that the verdict for the plaintiff is correct.
Weighing the weight of the evidence; and the circumstances clearly
showing the defendant's guilt, and the evidence of
negligence. The judgment is therefore reversed and the cause
remanded.

REVEREND AND HONORABLE

O'Connor, J., and McLaughlin, J., dissent.

35944

CHAS. LEVY CIRCULATING COMPANY,
a Corporation,

Appellant,

vs.

CENTRAL DISTRIBUTING COMPANY,
a Corporation,

Appellee.

36 7
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 605²

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

November 12, 1931, the above entitled cause having come on in regular course for trial, the defendant being absent and not represented, plaintiff had a judgment for \$267. Subsequently, on January 15, 1932, defendant made a motion to vacate same under section 21 of the Municipal Court act, which motion was allowed and the judgment vacated. Plaintiff appeals from this order.

The record shows that suit was commenced May 1, 1931, and defendant was duly served and appeared by counsel and filed an affidavit of merits. July 17th defendant's attorneys withdrew and the affidavit of merits was stricken. Subsequently a rule was entered on defendant to file an affidavit of merits which was done on September 4, 1931, by another attorney. As we have said, the case was reached for trial November 12, 1931, and judgment for plaintiff was entered.

In his affidavit in support of defendant's petition to have the judgment vacated the attorney for defendant states that on September 3rd when he filed defendant's affidavit of merits, he went to the Clerk's office and examined the half sheet and record and that on this date the cause was not on the call in any court; that the next he knew of the matter was in the following January, when he was notified by defendant that it had been served with an execution.

It is stated by counsel for plaintiff that in the daily Municipal Court Record for September 3, 1931, there was an

CHAS. BENT LUMBER CO.,
a corporation,
Appellant,
vs.
CENTRAL LUMBER CO.,
a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

2002 L.A. 605

MR. JUSTICE DELANEY, CHIEF JUSTICE.
MR. JUSTICE DELANEY, CHIEF JUSTICE.

November 12, 1931, the above entitled cause having come on in regular course for trial, the defendant being absent and not represented, plaintiff had a judgment for \$200. Subsequently, on January 15, 1932, defendant made a motion to vacate same under section 21 of the Municipal Code act, which motion was allowed and the judgment vacated. Plaintiff moved for this writ. The record shows that writ was commenced May 1, 1931, and defendant was duly served and appeared by counsel and filed an affidavit of merits. July 17th defendant's attorney withdrew and the affidavit of merits was allowed. Subsequently a writ was entered on defendant to file an affidavit of merits when was done on September 4, 1931, by another attorney. As we have said, the case was remanded for trial November 12, 1931, and judgment for plaintiff was entered. In his affidavit in support of defendant's petition to have the judgment vacated the attorney for defendant states that on September 2nd when he filed defendant's affidavit of merits, he went to the Clerk's office and examined the writ issued and found that on said date the case was not on the call for any court; that the next he knew of the matter was in the following January, when he was notified by defendant that it had been served with an

announcement that no calendar would be printed for the non-jury cases, and that fourth class cases would be heard in certain rooms in the City Hall; again, on September 14th the same publication reported that these cases would be called in room 908 and that, "beginning Monday, September 14th, all cases where no response is made by the defendant and a plaintiff only appeared, judgment will be entered. Watch the call." And in the same publication was notice of the trial of fourth class non-jury cases in room 908 City Hall by Judge Elliott, at 9:30 a. m., and the above entitled case with its Municipal court number was in the list of cases to be called on that day.

We think that the failure of defendant to be represented when its case was called for trial was due to the failure of the attorney to keep track of the court calls. As was said in Gburak v. Huss, et al., 235 Ill. App. 346, "There is nothing in this state of facts which would excuse counsel for not reading the published calls as they were announced, or otherwise ascertaining the state thereof. *** It would appear, therefore, that his failure to appear at the time the case was called for trial was due to his own lack of diligence and not to any mistake of fact."

The original half sheet has been certified to this court and it confirms the above recital of facts. We hold that the petition of defendant did not set up sufficient facts to justify vacating the judgment, and, therefore, the order of January 16, 1932, is hereby reversed.

REVERSED.

Matchett and O'Connor, JJ., concur.

... judgment that no evidence would be presented for the non-jury
... and that there is some reason to believe in certain points
... in the City Hall; again, in September 1934 the new publication
... reported that these cases would be called in from 1934 and that
... beginning Monday, September 1934, all cases were to be removed to
... made by the defendant and a minority only appeared, judgment will
... be entered. "Within the call," and in the same publication was
... notice of the trial of fourth class non-jury cases in room 108
... City Hall by Judge Smith, at 8:30 a. m., and the above entitled
... case with the defendant's court number was in the list of cases to
... be called on that day.
... We think that the failure of defendant to be represented
... when the case was called for trial was due to the failure of the
... attorney to have known of the court call. He was said in CHURCH
... L. K. B. et al., v. L. K. B. et al., "there is nothing in this case
... of facts which would excuse counsel for not reaching the court
... call as they were announced, or otherwise ascertaining the date
... thereof. ... it would appear, therefore, that the failure to ap-
... pear at the time the case was called for trial was due to the own-
... lack of diligence and not to any mistake of fact."
... The original call does not have been certified to this court
... and it contains the above recital of facts. We hold that the
... action of defendant did not set up sufficient facts to justify
... reversing the judgment, and, therefore, the order of January 12,
... 1934, is hereby affirmed.

552225

at 10:30 AM on 11/11/11

34266

SETH SEIDERS,
Appellee,

vs.

CHARLES F. HENRY,
Appellant.

377
APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

267 I.A. 605²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case received consideration upon a former hearing.

Seiders v. Henry, 259 Ill. App. 427. Henry appeals from a judgment in favor of Seiders in the sum of \$23,894.72 entered upon the finding of the court. The controversy arose out of a transaction in which it was supposed Seiders agreed to buy and Henry to sell for a price of \$84,000 a bungalow located on the roof of a co-operative apartment building at 201 East Delaware place in the city of Chicago. A payment of \$5000 was made by Henry on February 5, 1927, and on February 15, 1927, another payment of \$15,000, and on that date a writing with reference to the transaction was executed. Plaintiff sues for the return of the money paid by him and in his amended statement of claim demands judgment "for said sum of \$25,000 with interest thereon from March 15, 1927; for the further sum of \$1500, being money expended by plaintiff for carpets for said bungalow, and the further sum of \$150 representing charges incurred by plaintiff in moving his furniture to and from said bungalow, making the total sum due the plaintiff from defendant, exclusive of interest, \$22,900, for which sum the plaintiff asks judgment against the defendant, Charles F. Henry."

Plaintiff's case seems to have been brought upon the theory that there was a valid contract between the parties; that defendant had breached material terms of it, and that plaintiff was therefore entitled to recover the money paid in damages. Defendant contended

CHAS. F. HENRY,
Attorney.

MR. JUSTICE LATIMER WILLIAM THE CHIEF OF THE COURT.

This case received consideration upon a former hearing.

Henry v. Henry, 200 Ill. App. 487. Henry appeals from a judgment in favor of Henry in the sum of \$25,000.00 entered upon the trial

of the case. The controversy arose out of a transaction in

which it was suggested Henry agreed to buy and Henry to sell for a

price of \$25,000 a property located on the lot of a co-operatively

apartment building at 211 West Belmont place in the city of Chi-

cago. A payment of \$2500 was made by Henry on February 3, 1937,

and on February 12, 1937, another payment of \$10,000, and on that

date a writing with reference to the transaction was executed.

Plaintiff sued for the return of the money paid by him and in his

pleaded statement of claim against defendant "for said sum of

\$25,000 with interest thereon from March 12, 1937; for the further

sum of \$1800, being money expended by plaintiff for carrying out

said purchase, and the further sum of \$180 representing charges

incurred by plaintiff in saving his furniture to and from said

purchase, making the total sum due the plaintiff from defendant,

exclusive of interest, \$28,800, for which sum the plaintiff asks

judgment against the defendant, Charles F. Henry."

Plaintiff's case seems to have been brought upon the theory

that there was a valid contract between the parties; that defendant

had received material items of it, and that plaintiff was therefore

that plaintiff, not he, was guilty of the breach, and on that theory denied the right of plaintiff to recover. This court upon an examination of the record was of the opinion and found that plaintiff breached material terms of the contract and that he was not entitled to recover for that reason. The judgment of the trial court in his favor was therefore reversed with a finding of facts and judgment in this court in favor of defendant. A certiorari was allowed by the Supreme court, and the judgment of this court was reversed, the Supreme court holding (Seiders v. Henry, 347 Ill. 467):

"A review of the record fails to disclose any such compliance by Henry with all the terms of the contract as was essential to declare a forfeiture in his favor against Seiders."

The Supreme court also states:

"The contract by its indefinite terms required further agreements between the parties before it became of binding force upon either, and their subsequent efforts in this direction failed. Under these circumstances the judgment of the Municipal court of Chicago for the return of the \$20,000 paid by Seiders was warranted by the evidence."

That court therefore directed:

"The judgment of the Appellate court reversing the judgment of the Municipal court is reversed and the cause is remanded to the Appellate court for the First District, with directions to affirm the judgment of the Municipal court respecting the return of the \$20,000 to Seiders by Henry, and with further directions to determine what damages, if any, should be allowed to Seiders because of Henry's breach of the contract. The trial court assessed the sum of \$3894.72 as a separate item of damages against Henry, and the Appellate court made no finding of facts with reference to such damages. The determination of the correct amount of damages due, if any, is a fact to be ascertained on a review of the evidence in that regard by the Appellate court."

Pursuant to that direction we have examined the record with reference to the separate item of damages. The record and the briefs of the parties fail to disclose the basis upon which this item of \$3894.72 was computed. The amended statement of claim demands interest upon the sum of \$20,000 from March 16, 1927, and we presume that such interest was allowed and included in this item, but we find no evidence in the record directed to that issue, nor

is the subject mentioned in the brief's. In the absence of an express agreement, interest at common law is not recoverable. It is generally recoverable only when authorized by the statute. Bessie v. Clark, 13 Ill. 544; Fowler v. Harts, 149 Ill. 392; The People v. Franklin National Insurance Co., 343 Ill. 336. Section 2 of the Interest act (Smith-Hurd's Ill. Rev. Stats. 1931, chap. 74, p. 1754) directs in what case interest may be recovered. We presume the allowance of interest was made in the trial on the theory that the writing executed on February 15th was "other instrument of writing," as described in that statute. The Supreme court, however, holds: "The contract by its indefinite terms required further agreements between the parties before it became of binding force upon either, and their subsequent efforts in this direction failed." We assume that interest cannot be allowed under a writing which has been held not to have binding force upon either of the parties. This item so far as it is based on a claim for interest must therefore be disallowed.

A second item of damages claimed appears to have been the depreciation of carpets which plaintiff purchased for use in the bungalow and which were afterwards removed. The brief of defendant states that the court allowed \$1041.93 on this claim. The evidence discloses that Mr. Williams, the agent of defendant, delivered a key of the bungalow to plaintiff and that plaintiff on March 3, 1927, purchased carpets for this bungalow with the knowledge of Williams; that Williams, in fact, had introduced plaintiff to the dealer and through his intervention secured for plaintiff a wholesale price for the carpets. Plaintiff paid \$1934.27 for the carpets and the further sum of \$179.87 for padding to be used in connection with the same. The carpets were laid, but after the disagreement between the parties arose plaintiff took the carpets up and stored them. All of the carpets appear to have been ultimately used either by plaintiff himself or by the Rancho Real Company, a corporation, in

which plaintiff, his wife, and a Mr. Murd were the stockholders and of which plaintiff was president, Mrs. Seiders vice-president, and Mr. Murd, secretary and treasurer. There was testimony for plaintiff tending to show that the depreciation in the value of the carpet was about 50% of the cost price.

Defendant argues that in attempting to move into the bungalow and laying carpets in it plaintiff assumed the risk, and that he is not entitled to recover for any such expense, and defendant cites cases holding that a mere contract for the sale of real estate does not authorize the entry by the purchaser. Chappell v. McKnight, 108 Ill. 570; Coleman v. Connolly, 139 Ill. App. 323. If a valid contract existed between the parties it would seem that plaintiff had a right in reliance thereon to put the carpets in the bungalow and that defendant would thereafter be liable for any damages occasioned by a breach of that contract by him. If, however, there was no valid contract between the parties it would appear that plaintiff in buying and placing these carpets acted on his own responsibility and assumed the risk. As we interpret the opinion of the Supreme court it holds that there was no binding contract between the parties, and it would therefore seem that this item of damage should also be disallowed. The claim for damages for the moving and transportation of furniture would be controlled by the same rule.

Following the mandate of the Supreme court we therefore find as a matter of law that plaintiff is entitled to recover in this case the sum of \$20,000, and if within ten days from this date plaintiff will remit from the amount of the judgment the sum of \$3894.72, the judgment will be affirmed; otherwise it will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR; OTHERWISE
REVERSED AND REMANDED.

O'Connor, P. J., dissents.
McSurely, J., concurs.

[illegible]

35215

JACOB BLOOM,
Appellee, (Plaintiff)

vs.

PHILIP SCHWARTZ,
Defendant.

On Appeal of JOHN SCHWARTZ,
(Intervening Petitioner),
Appellant.

387
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 L.A. 605⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Jacob Bloom, judgment creditor of Philip Schwartz, brought garnishment proceedings summoning the Straus National Bank & Trust Co. and others as garnishees. The bank answered and John Schwartz intervened claiming certain notes and property in the hands of the bank. The findings were for plaintiff against the bank as garnishee and against John Schwartz, intervening petitioner, with judgment which John Schwartz seeks to reverse on this appeal upon the ground that the judgment against the principal defendant, Philip Schwartz, is void for want of jurisdiction.

The judgment against the principal defendant was entered March 11, 1926, in a suit upon a promissory note filed on March 13, 1925. When the cause came on for trial on September 15, 1925, it was dismissed for want of prosecution. Twenty-nine days thereafter, on October 14, 1925, a motion to vacate the order of dismissal was entered and set for October 30, 1925. The record does not show that any notice was served or petition filed in support of this motion. On November 6, 1925, an order was entered by agreement of the parties vacating the order of dismissal and reinstating the suit. The record does not disclose any notice of this motion or any petition filed in support of the same as required by section 21 of the Municipal court act, and intervening petitioner contends on the authority of numerous cases construing section 21 of the Municipal court act that since more than thirty days had expired

28
 COURT OF RECORDS
 207 L.A. 005

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA
 IN RE: [Name]
 Defendant

1. [Name] was born [Date] at [Place]. He is a [Nationality] and a [Residence]. He is a [Occupation] and a [Status].

2. [Name] was arrested on [Date] at [Place]. He was charged with [Charge]. He was held in custody at [Place] until [Date].

3. [Name] was arraigned on [Date] at [Place]. He pleaded [Plea]. He was sentenced to [Sentence].

4. [Name] was released on [Date] at [Place]. He was released on [Conditions].

5. [Name] was arrested on [Date] at [Place]. He was charged with [Charge]. He was held in custody at [Place] until [Date].

6. [Name] was arraigned on [Date] at [Place]. He pleaded [Plea]. He was sentenced to [Sentence].

7. [Name] was released on [Date] at [Place]. He was released on [Conditions].

8. [Name] was arrested on [Date] at [Place]. He was charged with [Charge]. He was held in custody at [Place] until [Date].

9. [Name] was arraigned on [Date] at [Place]. He pleaded [Plea]. He was sentenced to [Sentence].

10. [Name] was released on [Date] at [Place]. He was released on [Conditions].

between the date of dismissal and entry of the order of reinstatement the court was wholly without jurisdiction to enter the order. Flora v. Fields, 156 Ill. App. 341; Greenstone Furniture Co. v. Oliver, 233 Ill. App. 134, and People v. Wells, 255 Ill. 450, are a few of the cases cited and relied on. It is true, as the intervening petitioner contends, that garnishment proceedings cannot be maintained upon a void judgment, as was held in Baering v. Epp, 247 Ill. App. 51, and other cases cited. However, the record in this case discloses that the order reinstating the cause which had been dismissed, although entered more than thirty days after the dismissal, was entered by the agreement of the parties. It is not contended that the court was without jurisdiction of the subject matter. There is no doubt that defendant by consent could confer jurisdiction of his person, and the judgment entered was therefore not void. Carroll, Schendeff & Eckenicks, Inc., v. Hastings, 259 Ill. App. 564, and Steinhagen v. Trull, 324 Ill. 382, are recent cases which are conclusive against the contention of the intervening petitioner, and many others might be cited.

The judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

THE PEOPLE OF THE STATE OF ILLINOIS,)
 Defendant in Error,)

vs.)

GUST STELLAS,
 Plaintiff in Error.)

39
 ERROR TO MUNICIPAL COURT
 OF CHICAGO.

267 I.A. 606

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Gust Stellas, upon a plea of not guilty and upon trial by the court, a jury having been waived, was found guilty of a violation of an act approved May 26, 1917, (Smith-Hurd Ill. Rev. Stats. 1929, chap. 38, sec. 255) which provides:

"That any person who with intent to defraud shall make or draw or utter or deliver any check, draft or order for the payment of money upon any bank or other depository, and thereby obtains from any person any money, personal property or other valuable thing knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft or order in full upon its presentation, shall be guilty of a misdemeanor; and upon conviction thereof shall be fined not more than one thousand dollars or imprisoned not more than one year, or both. The making, drawing, uttering or delivering of such check, draft or order as aforesaid shall be prima facie evidence of intent to defraud. The word 'credit' as used herein shall be construed to mean an arrangement or understanding with the bank of depository for the payment of such check, draft or order."

Such was the provision of the statute at the time of this alleged offense. The provision has since been amended by an act approved July 7, 1931, (See Illinois Laws of 1931, p. 447; Smith-Hurd Ill. Rev. Stats. 1931, chap. 38, sec. 255, p. 1027.) The court, overruling motions in arrest of judgment and for a new trial, imposed a fine of \$500 and costs.

The evidence submitted by the State tends to show that on February 10, 1931, defendant was conducting a business in the city of Chicago and on that date entered into a partnership with the prosecuting witness, William Karles, the agreement being that defendant should put in as his share of the partnership the stock and assets of his business and that Karles should advance the

Defendant in Error.

Defendant in error.

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and upon trial by the court, a jury having been waived, was found

University of Virginia

U.S. State, 1935, Dec. 18, sec. 125 (125) which provides:

[illegible]

Such was the provision of the statute at the time of this alleged

THE ABOVE IS A TRUE AND CORRECT COPY OF THE ORIGINAL AS SUBMITTED TO THE COMMISSIONER OF THE GENERAL LAND OFFICE BY THE LANDLORDS OF THE TOWNSHIP OF BARNET, IN THE COUNTY OF MIDDLESEX, ON THE 10TH DAY OF JANUARY, 1881.

July 7, 1931, (see Illinois Laws of 1931, p. 447; 1931-1932, 111)

Nov. 2011 - Dec. 2011

will be a success. I've won a lot but I've lost a lot of money.

...and 0078 to

The evidence submitted by the State tends to show that as

February 10, 1941. Detachment was conducting a business in the city

est dit qu'il n'y a pas de doute que les deux

and said that the girl, as far as I know, was not

[illegible]

total sum of \$625. No articles of agreement or other writing concerning the agreement between these two persons were ever executed. Karles says that on April 17, 1931, defendant delivered to him a check in the sum of \$625 (which appears in the record as the State's Exhibit 1) and that he by agreement received this check in full payment for his one-half interest in this partnership business, which he had theretofore purchased; that defendant continued thereafter as the sole owner of the business; that relying upon this check he (the witness) gave up his interest therein. This check appears upon its face to have been drawn by defendant upon the Elmwood Park State Bank on May 8, 1931, at Elmwood Park, Illinois, for \$625, to the order of William Karles, and is endorsed "W. Karles."

It also appears from the evidence that on February 24, 1930, defendant opened an individual checking account at the Elmwood Park State Bank; that he closed this account on February 3, 1931, prior to the transaction in question, by withdrawing his balance which was at that time \$3.19. Karles testified that he deposited the check of Stellas in the Reliance State Bank on May 8, 1931, and that it was returned marked, "Account closed." On cross examination he stated that the check was "written in" (filled out) at the time it was given to him on April 17th; that he knew that defendant could neither read nor write except to sign his own name; that at the time the check was given to him (the witness) no papers of any kind were signed. He further stated that on that date he retired from the business and never went back. He admitted that it was a common practice for him and defendant while in business as partners to sign and give to each other checks in blank and that these checks being drawn on a joint account, the partner to whom the check was turned over would then countersign it and later when buying produce at the market would fill in the amount.

Phota Liakos, who defendant testifies "is the sweetheart

total sum of \$250. The articles of agreement or other writing containing the agreement between these two persons were never executed. The witness says that on April 17, 1931, defendant delivered to him a check in the sum of \$250 (which appears in the record as the State's Exhibit 1) and that he by agreement received this check in full payment for his one-half interest in this partnership business, which he had previously purchased; that defendant continued thereafter as the sole owner of the business; that nothing upon this check is (the witness) given by his defendant opponent. This check appears upon its face to have been drawn by defendant upon the Illinois State Bank on May 2, 1931, at Illinois Park, Illinois, for \$250, in the order of William J. [illegible] and is marked "T. J. [illegible]". It was received from the witness and on January 10, 1932, defendant opened an individual checking account at the Illinois State Bank; that he placed this account on January 2, 1932, from to the transaction in question, by withdrawing his balance which was at that time \$250.00. Defendant testified that he deposited the check of \$250 in the Illinois State Bank on May 2, 1931, and that it was withdrawn around "January 1932". He was asked to state that the check was "written in" (filled out) at the time it was given to him on April 17th; that he knew what defendant could sign and that he would sign his own name; that at the time the check was given to him (the witness) no papers of any kind were signed. He further stated that on May 2nd he received from the defendant and never saw again. He admitted that it was a check payable for his and defendant while in business as partners to sign and give to each other checks in Illinois and that these checks being drawn on a joint account, the parties to whom the check was issued never would have cashed it and later when paying proceeds of the check would still in the account.

of Karles," says that on April 4, 1931, she met defendant at Harrison and Morgan streets; she said he told her that he was going to throw Karles out of business and was not going to pay him a cent; that in another conversation defendant told her that he was throwing Karles out of business and was not going to pay him anything because he had made up his mind to do this. She states that defendant afterwards called her and asked her to meet him at Harrison and Morgan streets, and that he then told her "that he had carried out his intention to get Karles out of the business and gave him a bad check which Karles would never be able to cash."

Defendant testifies that the State's Exhibit 1 (the check) when he gave it to Karles on April 17th, was a blank check signed by him on one side of the line, leaving room for Karles to write his name on the same line, and that the check was given to Karles to use in purchasing produce at the market to the amount of not more than \$15 or \$20, as that was the entire balance of their joint account in the bank; that he never heard any more about the check until May 6th, when Karles telephoned him, "I either want my \$625 back or I shall put you in jail;" that he asked Karles what seemed to be the trouble. He says that Karles continued in the partnership business until May 6th; that until that time he had not known that the check was filled out for \$625 and payable to the order of Karles; that he never gave the check to Karles for the dissolution of the partnership or for any personal purpose; that he did not at this time have a personal account in his own name, and that Karles knew that defendant did not have a personal checking account in his own name at the time the check was given; that they never talked about the dissolution of the partnership at any time. He denied the conversations to which Phota Liakos testified and says that he had seen her only once or twice in his life when she came in and met Karles at the close of business and then went home with him.

of Karpis," says that on April 4, 1935, the next defendant at Harrison and Morgan arrested; and said he told her that he was going to throw Karpis out of business and was not going to pay him a cent; that in another conversation defendant told her that he was throwing Karpis out of business and was not going to pay him anything because he had made up his mind to do this. The next day defendant afterwards called her and asked her to meet him at Harrison and Morgan arrested, and said he then told her "that he had carried out his intention to get Karpis out of the business and gave him a bad check which Karpis would never be able to cash."

Defendant testifies that the State's Exhibit 1 (the check) when he gave it to Karpis on April 17th, was a check drawn against by him on one side of the line, leaving room for Karpis to write his name on the same line, and that the check was given to Karpis to use in purchasing produce at the market in the amount of not more than \$15 or \$20, at that was the entire balance of their joint account in the bank; that he never heard any more about the check until May 6th, when Karpis telephoned him, "I either want my \$200 back or I shall put you in jail;" that he asked Karpis what seemed to be the trouble. He says that Karpis continued in the partnership business until May 6th; that until that time he had not known that the check was filled out for \$200 and payable to the order of Karpis; that he never gave the check to Karpis for the dissolution of the partnership or for any personal purpose; that he did not at this time have a personal account in his own name, and that Karpis knew that defendant did not have a personal checking account in his own name at the time the check was given; that they never talked about the dissolution of the partnership at any time. He denies the conversation to which these witnesses testified and says that he had seen her only once or twice in his life when she came in and met Karpis at the close of business and then went home with him.

Several produce dealers testified that they knew of the custom of defendant and the prosecuting witness with reference to the execution of checks in blank. They corroborated defendant in that regard. Other checks also tending to corroborate the existence of this custom are in evidence. As already stated, it appears that defendant could not write other than to sign his name. The body of the check is made out in a handwriting which is clearly not his, and his name is attached to the check in a place that would indicate, in view of the custom, an intention that the name of the prosecuting witness was to be added as one of the makers of the check.

The State argues that we cannot consider the weight of the evidence because the certificate to the bill of exceptions does not expressly state that it contains all the evidence. While there is no formal certificate to that effect, it appears, we think, from other parts of the document that it is complete. Stickney v. Cassell, 1 Gil. 418; Harris v. Miner, 28 Ill. 135; Marine Bank v. Rushmore, 28 Ill. 463; The People v. Henckler, 137 Ill. 580; The People v. Nelson, 320 Ill. 273; Mullin v. Johnson, 98 Ill. App. 621.

The evidence of Pheta Liakos, we cannot doubt, is fabricated, and upon the whole we are disposed to think the evidence of defendant much more probable than that given by the prosecuting witness. In a criminal case it is necessary that guilt of the accused be proved beyond a reasonable doubt. We hold that quantum of proof was not produced in this case. Indeed, the evidence is not inconsistent with the theory that the prosecuting witness in this case was attempting to secure the return of the money he paid for an interest in the partnership by using the process of a criminal court.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

... have been heard testified that they knew of the
... of defendant and the preceding witness with reference
to the execution of checks in Miami. They corroborated defendant
in that regard. Other checks also leading to corroborate the
existence of this check are in evidence. As already stated, it
appears that defendant could not write other than to sign his
name. The body of the check is made out in a handwriting which
is clearly not his, and his name is attached to the check in a
place that would indicate, in view of the nature, an intention
that the name of the executing witness was to be added on one
of the names on the check.

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evidence because the certificate in the bill of exceptions does
not expressly state that it contains all the evidence. While there
is no formal certificate in that effect, it appears, as stated, from
other parts of the transcript that it is complete. Alford v. Y.
Alford v. Y., 111 So. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The evidence of these checks, as stated above, is
... and upon the whole we are disposed to think the evidence
of defendant much more probable than that given by the prosecuting
witness. In a criminal case it is necessary that guilt of the
... be proved beyond a reasonable doubt. It has been said
all proof was not presented in this case. Indeed, the evidence is not
inconsistent with the theory that the prosecuting witness in this
case was attempting to secure the return of the money he paid for
... in the purchase of the automobile by using the proceeds of a criminal
...
... the same testimony.
... the same testimony.

HUGO HARTNACK, for use of DR.
HARTNACK EXTERMINATING SERVICE,
Incorporated, a Corporation,
Appellee,

vs.

THE BOARD OF CHARITIES OF THE
ILLINOIS CONFERENCE OF THE EV.
LUTHERAN AUGUSTANA SYNOD, a
Corporation,

Appellant.

407
APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

267 I.A. 606

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued in assumpsit for compensation alleged to be due under contracts partly oral and partly written for services rendered in the fumigation of defendant's building for the purpose of destroying bedbugs and other vermin. Defendant filed a plea of the general issue with special pleas which set up that plaintiff did this work so negligently that he failed to exterminate the bugs and that several of the occupants lost their lives as a result of inhaling the poisonous gases used. The pleas in fact were for recoupment and counter claim for damages sustained. Attached to the pleas was an affidavit of merits which averred that plaintiff "did not exterminate bedbugs in, on or from said premises and did not fumigate said premises, but wholly failed so to do, and that in attempting to perform said work did so in so unskillful and negligent a manner and with such unskillful and negligent workmen and with so unsuitable and dangerous materials that neither the premises were fumigated nor the bedbugs exterminated therefrom, but that instead two occupants upon said premises were killed; that by reason thereof the defendant was obliged to and did expend the sum of Five Hundred (\$500.00) Dollars to the persons entitled thereto by reason of said two deaths, and was obliged to and did expend time and labor in cleansing said premises from the poisonous and deadly gases used by the plaintiff and Dr. Hartnack Extermi-

HUGH HARRISON, for use of Mr.
HARRISON, a Corporation,
Incorporated, a Corporation,
Incorporated.

THE HARRISON BUILDING CO. INC.
ILLINOIS CORPORATION OF THE CITY
OF CHICAGO, ILLINOIS
Incorporated, a Corporation,
Incorporated.

25001
HARRISON BUILDING CO. INC.
ILLINOIS CORPORATION OF THE CITY
OF CHICAGO, ILLINOIS
Incorporated, a Corporation,
Incorporated.

MR. HARRISON HARRISON HARRISON HARRISON HARRISON

plaintiff such in respect for communication alleged to
to due under contract partly oral and partly written for services
rendered in the investigation of defendant's building for the purpose
of destroying buildings and other property. Defendant filed a plea of
the general issue with special pleas which set up that plaintiff
did not work as negligently as he failed to take the necessary
steps and that several of the occupants lost their lives as a result
of inhaling the poisonous gases used. The plea in form was for
negligence and breach of contract. The plea was amended to
the plea was an admission of negligence which occurred that plaintiff
"did not exercise due diligence in, or of the said premises and did
not fumigate said premises, but negligently failed to do, and that
in attempting to perform said work he was negligent and
negligent a manner and with such negligence and negligent manner
and with so negligent and dangerous materials that he caused the
premises were fumigated and the occupants thereof killed;
but that instead two occupants upon said premises were killed;
that E. Thomas (deceased) the defendant was obliged to and did expend
the sum of five hundred (\$500.00) dollars to the persons entitled
thereby by reason of said two deaths, and was obliged to pay the
expense and labor in cleaning said premises from the poisonous
and deadly gases used in the fumigation of said premises.

nating Service on said premises, and was obliged to and did expend a large sum of money as and for the exterminating of bedbugs from said premises."

The cause was tried before a jury, and at the close of all the evidence the court on motion of plaintiff struck out evidence of defendant and instructed the jury to return a verdict for plaintiff in the sum of \$410.50. The verdict was returned and judgment entered thereon, which defendant seeks to reverse by this appeal. The controlling question in the case is whether the court erred in excluding the evidence and in directing the verdict.

There is practically no dispute as to the material facts disclosed by the evidence received and offered.

Defendant Board of Charities conducts a home for aged people at 7532-7556 Stony Island Avenue in the city of Chicago. Dr. Brandell, a clergyman, was the superintendent of the Home and Ingrid Anderson was the matron or head nurse. The building on the premises used as a home became infested with bedbugs, and in May or June, 1923, Dr. Brandell consulted with plaintiff, Dr. Hugo Hartnack (who was then conducting his business at 20 East Jackson Boulevard, Chicago) with reference to the extermination of the bugs.

Dr. Hartnack was quite experienced in matters of this kind. He had studied entomology and biology in Vienna, was graduated from the University in Gießen, Germany, in 1913; was a bacteriologist in the Kaiser Wilhelm Institute at Breslau, Germany, during the World War; made experiments in Russia with poisonous gases for the extermination of clothes lice and other vermin; had been employed by the German government after the war until 1924, when he came to this country. At first he worked for the Hayer company, aspirin manufacturers, and afterwards in the insecticide division in the Department of Agriculture of the United States, experimenting

"...and I am not going to let you see me again."

[illegible]

There is practically no dispute as to the material facts.

Relevant work of Twentieth Century-Fox and
people at 1935-1936 were found in the city of Chicago.
Dr. Harnett, a physician, was the consultant of the team and
Laurie Anderson was the person of best house. The building on the
premises was a small house located with bedrooms, and in May of
June, 1936, Dr. Harnett consulted with physician, Dr. Harnett.

17. HARRISON was also contacted by means of his friend, J. L. HARRISON, who was contacted by means of his friend, J. L. HARRISON, who was contacted by means of his friend, J. L. HARRISON.

He had studied zoology and biology in Vienna, was graduated from the University in 1908, worked in 1909, was a bacteriologist in the Kaiser Wilhelm Institute at Berlin, Germany, during the World War; made experiments in insects with poisonous gases for the government at different times and other venial; had been employed by the German Government after the war until 1924, when he came to this country. He first he worked for the Bayer company, again in small business, and afterwards in the bacteriologic division in the Department of Agriculture of the United States, specializing

with the use of poisonous gases for the extermination of insects and rodents like squirrels, gophers and coyotes. Thereafter he started an exterminating business of his own.

Dr. Hartnack says he told the superintendent of the Home that liquid bedbug treatments were ineffectual but advised the use of poisonous gas which had "the advantage of going into every crack and crevice and hits every single bedbug in the room, no matter where they are, and hits their eggs and kills them." He told the superintendent that the gas used was hydrocyanic gas which was very poisonous and that a number of precautions would be necessary; that they would proceed by sealing up the place, including the windows, in the morning so that the gas would not escape, would keep the people away, shoot the gas into the rooms to be fumigated and leave it there six or eight hours, after which men with gas masks would enter and open the windows; that after about two hours the men could work in the rooms without gas masks but that it would be necessary to keep the windows open over night if the rooms were to be used the same night for sleeping purposes. Dr. Hartnack told the superintendent that he would not advise him to do the fumigation while Miss Anderson was away because precautions were required, and he talked with her about the matter and about the precautions that were necessary.

On June 15, 1926, Dr. Hartnack was called by the Home and told that they were ready to go ahead with the fumigation, and he turned the matter over to a Mr. Sweet, who was then an associate with him in the business. Dr. Hartnack testified that in his opinion it would be safe under any circumstances for a person to occupy a room after three hours of ventilation in a fumigated room provided the windows were left open; that under the government regulations for the fumigation of ships, in some cases the ship might be entered after fifteen minutes. He described the

with the use of poisonous gases for the extermination of insects and vermin like scorpions, spiders and beetles. Dr. Harkness started an exterminating business of his own.

Dr. Harkness says he told the superintendent of the Home that liquid bedbug treatments were ineffective and advised the use of poisonous gas which has "the advantage of going into every crack and crevice and into every little bedbug in the room, no matter where they are, and into their eggs and little foam." He told the superintendent that the gas used was hydrocyanic gas which was very poisonous and that a number of precautions would be necessary; that they would proceed by opening up the place, including the windows, in the morning so that the gas would not escape, would keep the people away, shoot the gas into the rooms to be fumigated and leave it there six or eight hours, after which men with gas masks would enter and open the windows; that after about two hours the men could work in the room without gas masks but that it would be necessary to keep the windows open over night if the rooms were to be used the same night for sleeping purposes. Dr. Harkness told the superintendent that he would not advise him to do the fumigation while Miss Anderson was away because precautions were required, and he talked with her about the matter and about the precautions that were necessary.

On June 15, 1935, Dr. Harkness was called by the Home and told that they were ready to go ahead with the fumigation, and he turned the matter over to a Mr. Wood, who was then an associate with him in the business. Dr. Harkness testified that in his opinion it would be safe under any circumstances for a person to occupy a room after three hours of ventilation in a fumigated room provided the windows were left open; that under the Government regulations for the fumigation of ships, in some cases the gas entered after fifteen minutes. He described the

methods by which the presence of the gas might be detected. A test used by the government was to put mice into the hold of the ship to see whether they would live. There is also a colored paper test which has come into use in recent years. Another method of detection is by the odor of the room. Dr. Hartnack described in detail the manner by which in the course of fumigation the hydrocyanic acid gas was developed.

Mr. Sweet also testified as to the details of the fumigation, stating that he put up in the rooms danger signs showing skulls and crossbones, and warning all persons to keep away. He says that he turned the rooms over to the Home with the admonition that everyone must be kept out; that at the conclusion of the work and without tests other than that of smell and a so-called cigarette test, he stated that the rooms could be occupied the same night after the fumigation.

Defendant called as a witness Dr. Jeranson, the attending physician at the Home, who stated that he was called to the Home on the morning of June 29, 1928, at about 6:15 a. m.; that he found one of the occupants of the Home, John Helgison, who was about 70 years of age, in bed and unconscious. Andrew Borine, another occupant, about 68 years of age, was also in the room, and Dr. Jeranson gave evidence as to the condition of each of the indicating that they died as a result of cyanotic poisoning. Then the court interrupted to ask if there was any dispute as to whether these two men died from the effects of the gas that was used for fumigating. The attorney for plaintiff replied that there was a question of what they died from, and the court then stated that he would sustain the objection of plaintiff to this evidence upon grounds which he had stated in chambers, allowed a motion to strike out all Dr. Jeranson's testimony and sustained objections to defendant's offers to prove by the witness that the men died from poisoning generally

methods by which the presence of the gas might be detected. A test used by the Government was to cut wires into the wall of the ship to see whether they would live. There is also a colored paper test which has come into use in recent years. Another method of detection is by the odor of the room. Dr. Harrison described in detail the manner by which in the course of investigation the hydrogen cyanide acid gas was developed.

Dr. Sweet also testified as to the details of the investigation, stating that he put up in the room danger signs showing skulls and crossbones, and warning all persons to keep away. He says that he turned the room over to the House with the admonition that everyone must be kept out, that at the conclusion of the case and without test other than that of smell and a so-called alginate test, he stated that the room could be occupied the same night after the investigation.

Defendant called as a witness Dr. Johnson, the attending physician at the home, who stated that he was called to the home on the morning of June 22, 1935, at about 6:15 a. m.; that he found one of the occupants at the home, John Reigdon, who was about 70 years of age, in bed and unconscious. Andrew Dornie, another occupant, about 65 years of age, was also in the room, and Dr. Johnson gave evidence as to the condition of each of them indicating that they died as a result of cyanide poisoning. When the court interrupted to ask if there was any dispute as to whether these two died from the effects of the gas that was used for fumigating.

The attorney for plaintiff testified that there was a question of what they died from, and the court then stated that he would sustain the objection of plaintiff to this evidence upon grounds which he has stated in chambers, allowed a motion to strike out all Dr. Johnson's testimony and sustained objection to defendant's offer

known as hydrocyanic gas or fumes. The court stated:

"The objection will be sustained because the Court holds that in an action in assumpsit for work and labor performed you cannot recoup a claim for damages by reason of accidental death. Before you can recover for wrongful death you must strictly follow the statute in such case made and provided."

The court thereupon stated that he would hold this testimony irrelevant to the issues and refused to receive further evidence of that kind and struck out the evidence tending to show when these two men died, and the character and qualities of hydrocyanic gas and its effects upon human beings. In the course of the discussion the court stated:

"This court holds as a matter of law you cannot recoup damages direct or injury by this sort of action because of the wrongful death. The person who can collect for the wrongful death would be the administrator of the estate and not the institution or hotel where he lived."

The court also excluded expert testimony tending to show the time within which a room would be fit for occupancy after having been fumigated by this gas in the manner described, and evidence tending to show the expense to which defendant was put in providing medical care, funerals, etc., for the persons who died and medical care and attendance for another occupant who became ill.

Irrespective of whether all of the damages claimed by defendant might be recovered, we hold that the court erred in excluding the evidence tending to show that plaintiff was negligent in the manner in which the fumigation was conducted and misapplied the law in holding that in an action by plaintiff for compensation for doing the work defendant could not recoup for negligence of plaintiff. The statute as amended June 1, 1929 (Smith-Murd's Ill. Rev. Stats., chap. 110, sec. 47, p. 2200) expressly provides that such damages may be set off in actions upon any contract, and independent of this statute and prior to its enactment there were numerous cases holding that in a case of this character a defendant might defeat the action by showing his right to recoupment. A case

known as hydrophobia was at times, the court stated:

"The physician will be recalled because the court knows that in an action in assumpsit for work and labor performed you cannot recover a claim for damages by reason of mental health. Before you can recover for wrongful death you must satisfy the jury that the death was caused and avoided."

The court then stated that the court held this testimony relevant to the issue and refused to receive further evidence of that kind and through the evidence tending to show when these two men died, and the character and condition of hydrophobia and the other men known before. In the course of the discussion the court stated:

"This court holds that a finding of fact for the purpose of determining whether or not the death was caused by the hydrophobia would be the result of the evidence and not the result of the evidence of the death."

The court also stated that the testimony tending to show the time within which a man would be ill for recovery after having been infected by this gas in the manner described, and evidence tending to show the expense of which defendant was put in treating medical care, therefore, etc., for the purpose of the trial and medical care and attendance the evidence was relevant and admissible.

In respect of whether all of the damages claimed by the defendant might be recovered, we held that the court tried in excluding the evidence tending to show that plaintiff was negligent in the manner in which the infection was contracted and misapplied the law in holding that in an action by plaintiff for compensation for doing the work defendant could not recover for negligence of plaintiff. The statute as amended June 1, 1913 (Mich. Stat. 111, Sec. 111, Mich. Stat. 111, Sec. 111, Mich. Stat. 111, Sec. 111) expressly provides that such damages may be set off in actions upon any contract, and independent of this statute and prior to the amendment there were numerous cases holding that in a case of this character a defendant might

directly in point is Holmes v. McKinnon, 130 Ill. App. 320. Other cases which announce a similar rule are Beam v. U.S.C. & St. L. R.R.Co., 97 Ill. App. 24; Lloyd Co. v. Manufacturers' & Merchants' Co., 102 Ill. App. 651; Sandow Motor Truck Co. v. Brown, 216 Ill. App. 103. These cases are all cited in the brief of defendant, and plaintiff does not undertake to distinguish or argue that they are not applicable. The distinction between the right of recoupment and set-off in an action in assumpsit for compensation and the statutory right of action for wrongful death is clear and fundamental. The court erred in failing to recognize this distinction. A case like this seems analogous to one where a physician suing for compensation, having failed to exercise ordinary skill, may not recover. 48 Corpus Juris, sec. 177, p. 1161.

Defendant also contends that since these claims were assigned to the corporation by Dr. Hartnack, plaintiff cannot recover because the declaration fails to show compliance with section 18 of the Practice act. Madison & Kedzie State Bank v. Old Reliable Motor Co., 236 Ill. App. 442; McKinnon v. Studebaker Sales Co., 248 Ill. App. 596; Winitt v. Kornblith, 248 Ill. App. 108; Gallagher v. Schmidt, 313 Ill., 40, are cited. This case, however, is brought in the name of the party to the contract for the use of the assignee. Section 18 of the statute is therefore not applicable.

For the reasons indicated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

36004

OSCAR H. MAUGAN, as Trustee,
(Complainant) Appellee,

v.

CARL THORGERSEN, et al,
(Defendants) appellants.

47 7
INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

COOK COUNTY.

267 I.A. 606³

Opinion filed June 23, 1932

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order of the Circuit Court appointing a receiver for premises involved in a foreclosure proceeding.

The motion for the appointment was supported by the bill of complaint and a petition, to which the defendant, Bernard Given, owner of the equity, filed an answer. Upon reference to a Master in Chancery, proofs were taken on the application and the appointment of a receiver recommended and made.

The principal question involved relates to the sufficiency of the property as security for the mortgage indebtedness. The trust deed is in the usual form, pledging the rents, issues and profits as security for the indebtedness. The master heard the testimony of eight witnesses, who testified as to the value of the property as improved, and at the conclusion of the hearing filed his report finding in effect that the property was insufficient security for the indebtedness.

As grounds for reversal, the owner of the equity alleges (1) that the burden of showing facts justifying the appointment of a receiver is upon the complainant, and (2) that the master's recommendations were contrary to the weight of the evidence.

With reference to the first contention, it is conceded that the burden of making a showing to justify the appointment of a receiver rests upon the person applying for the appointment.

GEORGE H. HANCOCK, as witness,
(Complainant) vs.
DANIEL THOMAS, as witness,
(Defendant).

IN SENATE
JANUARY 1893

REPORT

1893 A. A. 1000

Opinion filed June 22, 1893

This is an investigation report from an order of the
Grand Jury regarding a receiver for premises involved in a
foreclosure proceeding.

The action for the foreclosure was brought by the
bill of complaint and a petition, to which the defendant, Daniel
Thomas, answered by a denial, filed in answer. The petition is a
motion in equity, which was taken on the application and the
appointment of a receiver recommended and made.

The principal question involved relates to the validity
of the appointment of receiver for the premises involved.
The first issue is in the case of the receiver, Daniel Thomas, and
whether an equity for the foreclosure. The receiver heard the
testimony of eight witnesses, who testified to the value of the
property as improved, and of the condition of the property filed
his report, which is filed with the records and proceedings
concerning the foreclosure.

As grounds for removal, the owner of the equity alleges
(1) that the action of the court in appointing the receiver of
a receiver is upon the complaint, and (2) that the receiver's
recommendation was contrary to the weight of the evidence.
When reference is made to the first contention, it is conceded
that the burden of making a showing to justify the appointment of
a receiver rests upon the person applying for the appointment.

Frank v. Siegel, 283 Ill. App. 318; Maddonan v. Liberty Land & Investment Co., 309 Ill. 103. The determination of the second proposition rests upon the question of fact relating to the value of the security and is to be determined from a consideration of the evidence adduced before the master and the rules of law applicable thereto.

The value of the security as testified to by petitioner's four witnesses ranged from \$300,000 to \$320,000. Defendant offered four witnesses whose estimates as to the value of the security ranged from \$275,000 to \$339,000.

Obviously, the sale contemplated pursuant to foreclosure must necessarily be a forced sale. Witnesses for both parties testified that there is today practically no market for real estate and that it is fairly impossible to secure a reasonable price for real estate at a sale in the open market. The witnesses also stated that there had been no sales of real estate in recent months in the vicinity of these premises which would furnish a fair basis upon which the mortgaged property might be evaluated. It would seem to follow, therefore, that the only two methods of arriving at an estimate of the property value are: (1) the reconstruction cost less depreciation, plus land value, and (2) a capitalization of rental value. The record contains evidence of the value of the premises based upon both of these methods, the difference in opinion of the various witnesses being based principally upon the land cost value of the real estate, the cubic foot cost of construction, less depreciation and the rental value of the property as improved.

We have examined the record carefully, and while there appear to be some slight discrepancies in the estimates upon which petitioner's values are based, it seems fairly clear from all the evidence that the margin of security in relation to the indebtedness,

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

... ..

the security and is to be determined from a consideration of the evidence advanced before the court and the value of the evidence.

Accepted: 1999

Witnessed and attested at Dallas on this 1st day of May 1964

benefits calculated: \$600,000 or 600,000 more dependent on what

four witnesses whose evidence was sufficient to establish the fact of the murder.

RECEIVED

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and neither did the parents. She heard a telephone ring

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of the real estate, the entire cost of construction, less the amount

Reversionary interest in the property is reserved.

we have examined the record carefully, and while there

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SECRET

which aggregates approximately \$885,000, is so uncertain under present real estate market conditions as to afford no assurance to the court that the property will yield a sufficient sum to cover the mortgage indebtedness. This conclusion is supported by one of defendants' own witnesses, who, while estimating the fair cash market value of the land and building at \$375,000, also stated in his opinion that the improved premises are fair security for a loan not to exceed \$170,000.

While it is true that complainant must make a showing sufficient to satisfy the court when application for the appointment of a receiver is made, where the principal issue before the court relates to the value of the security, the requirements of the rule ought not to be so exacting as to defeat the mortgagee's rights when substantial defaults have been made under the trust deed. Therefore, in determining the value of the security in its relation to the probable existing indebtedness, the court to whom the application is made should as one element seek to determine from the facts, if there be a hearing, or from the pleadings and affidavits where such are relied upon to support the application, whether the property is likely to yield a sufficient sum upon sale in the open market to pay the indebtedness due under the decree to be entered. Where the margin of security is scant, uncertain, or doubtful, we believe the chancellor should resolve the uncertainty in favor of complainant and make the appointment.

Moreover, the question of fact presented to the master and the chancellor in this proceeding was supported by evidence of a conflicting nature, and from an examination of the record, we believe the master and court may well have placed greater reliance upon the testimony of the petitioner's witnesses than those of defendant. Under the circumstances, we are not inclined to hold the

which represents approximately \$250,000, is to maintain under present real estate market conditions as to what no reference to the court that the property will yield a sufficient sum to cover the mortgage indebtedness. This conclusion is supported by one of the witnesses, one witness, who, while estimating the fair market value of the land and building at \$275,000, also stated in his opinion that the improved premises are fair security for a loan not to exceed \$170,000.

While it is true that complainant must make a showing sufficient to satisfy the court when application for the appointment of a receiver is made, where the principal issue before the court relates to the value of the security, the requirements of the rule ought not to be so exacting as to defeat the mortgagee's rights.

When substantial evidence has been introduced, the court, in determining the value of the security in the relation to the probable existing indebtedness, the court is when the application is made should not be deterred from the fact, it there be a hearing, on from the findings and affidavits where such are relied upon to support the application, whether the property is likely to yield a sufficient sum upon sale in the open market to pay the indebtedness and under the facts to be ascertained. Where the margin of security is small, uncertain, or doubtful, we believe the chancellor should resolve the uncertainty in favor of complainant and make the appointment.

However, the question of fact presented to the master and the chancellor in this proceeding was supported by evidence of a conflicting nature, and from an examination of the record, we believe the master and court may well have placed greater reliance upon the testimony of the petitioner's witnesses than those of the defendant. Under the circumstances, we are not inclined to hold the

master's findings are contrary to the weight of evidence, and for the reasons stated, the order of the Circuit Court appointing a receiver will be affirmed.

ORDER AFFIRMED.

NEBEL, AND WILSON, JJ. CONCUR.

THESE THINGS ARE KNOWN TO THE PUBLIC BY THE PRESS, AND THE
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35993

A. J. HENNINGS, Trustee,
Complainant (Appellee),

v.

STONY ISLAND STATE SAVINGS BANK,
as Trustee, etc., et al.,
Defendant.

On Appeal of Foreman-State
National Bank,
Defendant (Appellant).

427
INTERLOCUTORY APPEAL

FROM THE CIRCUIT COURT

OF COOK COUNTY.

267 I.A. 606^A

Opinion filed June 22, 1932

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by the Foreman-State National Bank, one of the defendants, from an order entered by the court on February 8, 1932, giving other and further powers to the receiver already appointed. An appeal is provided for under Chap. 110, Sec. 123 of the Practice Act, Unhill's Ill. Rev. Stats. This order entered on February 8, 1932, as prayed for in a certain verified petition of the receiver, is in part as follows:

'On motion of Joseph McCormack, solicitor for Hyde-Part-Kenwood National Bank, Receiver, it is ordered that the Order of Appointment of said Receiver be amended so as to add thereto the following:

'The said Receiver is hereby authorized and empowered to institute such suits or other legal proceedings in the Municipal Court, or other court, as may be deemed necessary or proper by said Receiver to collect such due and unpaid rents, issues and profits of the property conveyed by the Trust Deed under foreclosure herein, as it shall have been unable to collect without resort to such suits or other legal proceedings.' "

On July 12, 1930, A. J. Hennings, as Trustee, complainant, filed a bill to partially foreclose a first mortgage trust deed executed by Sidney and Alice E. Masterlik under date of September 15, 1927, securing \$248,000, evidenced by bonds, to which were attached interest coupons, aggregating the principal sum, secured by six parcels of real estate, with improvements thereon, described in the trust deed.

It is further charged in the bill that certain defaults

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A. J. HENNING, Trustee,
Commissioner (Assistant)

Y.

STORY TRUSTS - TRUSTEES
as Trustee, etc., et al.,
California.

On appeal of testimony taken
National Bank
California (San Francisco).

Opinion filed June 23, 1932

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CALIFORNIA

This is an introductory appeal by the National Bank

National Bank, one of the defendants, from an order entered by

the court on February 2, 1932, giving order and further orders to

the receiver already appointed. An appeal is provided for under

Chap. 110, sec. 123 of the Probate Act, section 111, Rev. Stat.

This order entered on February 2, 1932, was stayed for a certain

verified petition of the receiver, in its own right.

On motion of Joseph Henning, solicitor for Hyde Park

National Bank, receiver, it is ordered that the

Order of appointment of said receiver be annulled as to

as to the following:

'The said receiver is hereby authorized and empowered

to institute such suits as other legal proceedings in

the national bank, or other entity, as may be deemed

necessary or proper by said receiver in connection with

the said bank, to make and receive of the property

managed by the Trust Trust National Bank, as

it shall have been made in connection with the said

suits or other legal proceedings.

On July 12, 1932, A. J. Henning, as Trustee, complain-

ant, filed a bill to partially foreclose a first mortgage trust

deed executed by Henry and Alice E. Henning under date of

September 12, 1927, securing \$243,000, evidenced by bonds, to which

were attached interest coupons, aggregating the principal sum,

secured by six parcels of real estate, with improvements thereon,

located in the first deed.

were made in payments due; that certain persons, firms and corporations have filed mechanics' liens and suits to enforce the mechanics' liens, and that it is important that a receiver take charge of the property. The bill names as the defendant the Stoney Island State Savings Bank, and prays, among other things, that a receiver may, upon the filing of this bill, be appointed under the express provisions of the trust deed, to take immediate possession of the premises, with the usual powers of receivers in chancery.

On July 14, 1930, a verified petition was presented to the court by the complainant, the charges of which are, in substance, the same as those in the bill of complaint, and on the same date the Hyde Park, Kenwood National Bank was appointed receiver by order of the court; and thereupon, on July 14, 1930, the complainant's bond was filed and approved by the court. From the record it appears that thereafter the above named receiver entered into possession of the premises and has remained in possession since that time.

The defendant before this court was named party defendant by an order entered on April 18, 1931, and after filing certain demurrers, which were sustained, the complainant was granted leave to file his amendment to the supplemental and amended bill of complaint, to which the Foreman-State National Bank filed its answer.

The defendant's position is that the order of February 8, 1932, purporting to and in fact and form amending the order of July 14, 1930, in legal effect is embodied and transcribed into the latter order, which created the receivership, and that this court should now determine from the record the propriety of the order appointing the receiver.

It is clear that the receiver had the power to collect the rents of said property under the terms of the order of appointment, and it is a reasonable inference that from this power the

were made in accordance with the certain evidence, time and money-
 actions have been taken, and since to enforce the mechanism
 license, and that it is important that a receiver take charge of the
 property. The bill names as the defendant the Attorney General
 Having said, and more, many other things, that a receiver may
 upon the filing of this bill, be appointed under the express au-
 thority of the court, to take immediate possession of the
 premises, with the usual power of receivers in bankruptcy.

On July 12, 1893, a verified petition was presented

to the court by the complainant, the charges of which are, in sub-
 stance, the same as those in the bill of complaint, and on the same
 date the said bill, amended petition and verified petition by
 order of the court and returned, on July 12, 1893, the com-
 plainant's bond was filed and removed by the court. From the record
 it appears that thereafter the above named receiver entered into
 possession of the premises and has remained in possession since
 that time.

The defendant, within this court has moved with defendant

by an order entered on April 12, 1893, and after filing certain
 exhibits, which were received, the defendant was directed to
 file his answer to the complaint and amended bill of com-
 plaint, to which the defendant's National Bank filed its answer.
 The defendant's position is that the order of February

2, 1893, purporting to and in fact and form annulling the order of
 July 12, 1893, is in effect is annulled and annulled into
 the latter order, which created the receivership, and that this
 court should not determine from the record the propriety of the

order annulling the receivership.

It is also stated that the plaintiff and the party in interest

the parties of this controversy under the terms of the order of appoint-

receiver had authority to use all lawful means to collect the rents due, and to enforce the payment of money due for rent from tenants by proper legal proceedings.

The order appealed from is but an administrative order, and does not give the receiver other and further additional powers than it had under the order appointing the Hyde Park-Kenwood National Bank.

The Legislature never intended under the facts in the instant case that appellant's appeal would give the court jurisdiction to question the legality of the order of appointment entered on July 14, 1930, if so, the thirty day limitation within which an appeal from the order of the appointment of a receiver may be perfected would be nullified.

Other questions have been called to our attention, but in view of the conclusions we have reached, it will not be necessary for us to pass upon them, and the appeal is dismissed.

APPEAL DISMISSED.

FRIEND, P.J. AND WILSON, J. CONCUR.

resistor and authority to use all funds means to collect the taxes due, and to enforce the payment of money due for rent from tenants by proper legal proceedings.

The order suggested that it was an administrative order, and does not give the receiver order and further additional powers than it had under the order appointing the Hyde Park-Kensington National Bank.

The Registrar never intended under the facts in the instant case that the receiver's special would give the court jurisdiction to question the legality of the order of appointment entered on July 14, 1920, if not the thirty day limitation within which an appeal from the order of the appointment of a receiver may be perfected would be nullified.

Other questions have been called to our attention, but in view of the limitation on time provided, it will not be necessary for us to pass upon them, and the appeal is dismissed.

ORDER OF THE COURT.

ENTERED, JULY 14, 1920, BY THE COURT.

36020

RUSSEL FIREBAUGH, as Trustee,
(Complainant) Appellee,

v.

SAM COHN, et al,

INTERLOCUTORY APPEAL OF SAM COHN,
(Defendant) Appellant.

43
INTERLOCUTORY APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

267 I.A. 606

Opinion filed June 22, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

This is an interlocutory appeal from an order entered March 5, 1932, appointing a receiver upon a bill of complaint filed by Russell Firebaugh, as trustee, representing all the bondholders under a certain trust deed described in said bill of complaint. The bill was filed September 30, 1931, and on October 23, 1931, after a hearing before the chancellor, a motion for the appointment of a receiver was denied. Defendants entered their appearance October 17, 1931 and filed their answers December 31, 1931. Thereupon complainant filed its petition charging a default in the payments due under the trust deed and electing to take possession of the real estate in accordance with the terms of the trust deed and asking that the defendants be restrained and enjoined from interfering with the possession of the premises by the trustee. Issue being joined on the petition, it was referred to a master in chancery for the purpose of determining whether or not there were any defaults under the terms of the trust deed described in the bill of complaint and with directions to the master to report back his conclusions thereon.

RUSSELL WILSON, as Trustee,

(Defendant) vs.

v.

WILLIAM J. WILSON, et al.,

INTERCOMITY APPEAL OF THE COURT,

(Defendant) vs.

INTERCOMITY APPEAL OF THE COURT,

WILLIAM J. WILSON, et al.,

COOK COUNTY,

3871A. 608

Opinion filed June 22, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

This is an interlocutory appeal from an order entered March 5, 1932, appointing a receiver upon a bill of complaint filed by Russell Wilson, as trustee, representing all the bondholders under a certain trust deed described in said bill of complaint. The bill was filed September 30, 1931, and on October 23, 1931, after a hearing before the chancellor, a motion for the appointment of a receiver was denied. Defendants entered their appearance October 17, 1931 and filed their answers December 31, 1931. Thereupon complainant filed the petition charging a default in the payments due under the trust deed and electing to take possession of the real estate in accordance with the terms of the trust deed and asking that the defendants be restrained and enjoined from interfering with the possession of the premises by the trustee. Issue being joined on the petition, it was referred to a master in chancery for the purpose of determining whether or not there was any default under the terms of the trust deed described in the bill of complaint and with directions to the master to report

The trust deed described in the bill of complaint provided, among other things, that in case of default in the payment of principal or interest of any of the bonds when due, the trustee could declare all of the indebtedness payable immediately and should have the power to enter and take possession of the premises. A provision in the trust deed further provides that, upon a default, the trustee, without regard to the solvency of the mortgagor or owner of said premises, would be entitled to have a receiver appointed for the purpose of taking possession of the premises together with the rents, issues and profits thereof. An amendment to the bill of complaint described the improvements on the premises, together with the rentals derived therefrom, the amount of the mortgage then due, amounting to \$127,000, and facts concerning the physical value of the properties showing that the market valuation of the property, based upon rental values and its physical condition amounted to approximately \$95,000.

The master's report found that there was a default, as charged. March 5, 1932, complainant renewed its motion for a receiver, which was granted and it is from this order that the appeal has been taken to this court.

The order recites that the matter was heard,

"upon notice to the holders of the equity of redemption, together with all parties involved, and upon application of complainant for appointment of a receiver."

The order further states,

"And the Court having heard the evidence and considered said report, and being fully advised in the premises, finds that it is necessary for the preservation of the premises which are the subject matter hereof, that a receiver be appointed for said premises, it appearing to the court that it is probable that there will be a deficiency after sale, and that the grantors in said trust deed are unable to satisfy same, and that the premises are scant security for the amount due."

The trust deed described in the bill of complaint provided, among other things, that in case of default in the payment of principal or interest of any of the bonds when due, the trustee could foreclose all of the indebtedness payable immediately and should have the power to enter and take possession of the premises. A provision in the trust deed further provided that, upon a default, the trustee, without regard to the conveyance of the mortgage or owner of said premises, would be entitled to have a receiver appointed for the purpose of taking possession of the premises together with the rents, issues and profits thereof. It was claimed in the bill of complaint that the improvements on the premises, together with the rents derived therefrom, the amount of the mortgage then due, amounting to \$187,000, and facts concerning the physical value of the properties showing that the correct valuation of the property, based upon rental value and its physical condition amounted to approximately \$25,000. The master's report found that there was a default, as charged. March 2, 1932, complainant renewed its motion for a receiver, which was granted and it is from this order that the appeal has been taken to this court. The order recites that the matter was heard, "upon notice to the holders of the equity of redemption, together with all parties interested, and upon application of complainant for appointment of a receiver." The order further states, "and the Court having heard the witnesses and considered all relevant facts, and being fully advised in the premises, finds that it is necessary for the preservation of the premises which are the subject matter hereof, that a receiver be appointed for said premises, it appearing to the court that it is probable that there will be a delinquency after sale, and that the trustee in said deed was unable to actually sell, and that the premises are now mortgaged for the amount due."

It is insisted on behalf of defendant Cohn that the application for the appointment of a receiver was without proper notice; that the burden was upon the complainant to support the order by sufficient proof; and that the court should have considered only the master's report and not additional evidence on the motion for a receiver.

The evidence heard before the chancellor on the application for a receiver is not preserved by a certificate of evidence and we are only concerned with the question as to whether or not the order contained sufficient ultimate facts to warrant the chancellor in appointing a receiver. The order recites that notice was given to all parties concerned, including the defendant Cohn, and finds that the premises are scant security for the amount due. These are sufficient ultimate facts upon which to sustain an application for a receiver under the bill of complaint filed in the proceeding. The evidence not being preserved and the ultimate facts having been set forth in the order, this court is bound by the recital in the order of the chancellor. Rybakowicz v. Rybakowicz, 290 Ill. 350; Chandler v. Fisher, 285 Ill. 57; Allen v. LeMoyné, et al 102 Ill. 25; Koch v. Arnold, 242 Ill. 208.

It is insisted that the court had no right to consider the master's report, as the rule is that the court should not hear testimony upon the hearing on a master's report, but should refer the matter back to the master for him to consider any additional evidence. The chancellor, however, did not enter any ruling upon the master's report, but the order entered pertains only to the application for the appointment of a receiver which was a separate and distinct proceeding. While the order recites that the cause was heard on the master's report, it also states that it was heard upon the application of the complainant for the appointment of a

It is insisted on behalf of defendant John that the application for the appointment of a receiver was without proper notice; that the master was upon the complaint to support the order by sufficient proof; and that the court should have considered only the master's report and not additional evidence on the motion for a receiver.

The evidence heard before the chancellor on the application for a receiver is not preserved by a certificate of evidence and is only concerned with the question as to whether or not the order contained sufficient evidence to warrant the chancellor in appointing a receiver. The order recites that notice was given to all parties concerned, including the defendant John, and that that the premises are held subject to the amount due. These are sufficient evidence facts upon which to sustain an application for a receiver under the bill of complaint filed in the proceeding. The evidence not being preserved and the minute facts having been set forth in the order, this court is bound by the recital in the order of the chancellor. Wyckoff v. Wyckoff, 230 Ill. 530; Granger v. Fisher, 232 Ill. 57; Allen v. Johnson, et al. 108 Ill. 52; Koch v. Arnold, 242 Ill. 202.

It is insisted that the court had no right to consider the master's report, as the rule is that the court should not hear testimony upon the hearing on a master's report, but should refer the matter back to the master for him to consider any additional evidence. The chancellor, however, did not enter any ruling upon the master's report, but the order entered pertains only to the application for the appointment of a receiver which was a separate and distinct proceeding. While the order recites that the same was heard on the master's report, it also states that it was heard upon the application of the complaint for the appointment of a

receiver. No order was entered as to the report, either confirming or reversing it. The only order entered was concerning the appointment of a receiver and we assume that the testimony heard by the court was sufficient, independent of the master's report.

We see no reason for disturbing the order appointing the receiver and therefore the order of the Superior Court is affirmed.

ORDER AFFIRMED.

FRIEND, P.J. AND HEBEL, J. CONCUR.

receiver. No order was entered as to the report, either confirming or reversing it. The only order entered was concerning the appointment of a receiver and we assume that the testimony heard by the court was sufficient, independent of the master's report. We see no reason for disturbing the order appointing the receiver and therefore the order of the Supreme Court is affirmed.

ORDER AFFIRMED.

MR. JUSTICE, J. AND MR. JUSTICE, J. CONCUR.

34983

MARY ROLINEK,
(plaintiff),
Appellee,

v.

SHERMAN STATE BANK,
a corporation, (defendant),
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

267 I.A. 607¹

PRESIDING
MR. JUSTICE KRAMER DELIVERED THE OPINION OF THE COURT.

November 13, 1928, Mary Rolinek sued the Sherman State Bank, a corporation, to recover damages claimed to have been sustained by her by reason of the fraud and deceit of the defendant in selling to plaintiff gold mortgage bonds of the face value of \$3,000. There was a trial by jury, resulting in a verdict and judgment in favor of plaintiff for \$3,816.75. To reverse this judgment the defendant appealed.

The first count of plaintiff's amended declaration charged the defendant with selling to plaintiff on June 15, 1922, \$3,000 par value of bonds of the Polonia Soap Company, which purported to be first mortgage bonds on real estate of said Soap Company in Chicago, Illinois, but in reality was a junior mortgage, and alleged that plaintiff, relying upon the statements contained in said bonds that said bonds were secured by a first mortgage, purchased from the defendant said bonds. The second count of the amended declaration alleged that on July 12, 1921, the Polonia Soap Company executed a trust deed, dated July 25, 1921, for certain real estate in Chicago, Illinois, to secure the payment of an issue of \$250,000 of bonds which, by their terms, purported to be a first lien on the real estate; that the defendant meaning and intending

JOHN HENRY
(Plaintiff)

vs.

THE CHICAGO TRADING COMPANY
(Defendant)

RESIDING

IN THE CITY OF CHICAGO, ILLINOIS

Comes now the Plaintiff, JOHN HENRY, and the Defendant, THE CHICAGO TRADING COMPANY, by their respective attorneys, and moves the Court for an order compelling the Defendant to pay to the Plaintiff the sum of \$100,000.00, with interest thereon from the date of the filing of this motion until paid, and for costs of this motion.

The first count of Plaintiff's amended petition charges the Defendant with failing to pay to Plaintiff on June 15, 1931, \$100,000 par value of bonds of the Chicago Soap Company, which purported to be first mortgage bonds on real estate of said Soap Company in Chicago, Illinois; but in reality was a junior mortgage. One alleged that Plaintiff, relying upon the statements contained in said bonds that said bonds were secured by a first mortgage, purchased from the Defendant said bonds. The second count of the amended petition alleges that on July 15, 1931, the Chicago Soap Company executed a trust deed, dated July 15, 1931, for certain real estate in Chicago, Illinois, to secure the payment of an issue of \$100,000 of bonds which, by their terms, purported to be a first mortgage on the real estate. That the Defendant was and is holding

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GOOD MORNING

AMERICAN TRADING COMPANY

to defraud plaintiff, fraudulently represented that the bonds were secured by a first mortgage and offered to sell some of said bonds to plaintiff; that on June 15, 1921, plaintiff, relying upon said false and fraudulent representations, purchased from defendant bonds of the par value of \$3,000; that the representations made by defendant that the said bonds were secured by a first mortgage upon said real estate were false and defendant knew at the time it sold said bonds to plaintiff that said bonds were not secured by a first mortgage and it knew that said bonds were secured by a junior mortgage upon said real estate. To the first count defendant filed the general issue, a special plea of the Statute of Limitations requiring such actions to be brought within five years, and seven other special pleas. To the plea of the Statute of Limitations, plaintiff filed a demurrer, which was sustained. To the second count the defendant filed the general issue and also pleaded the Statute of Limitations, requiring such actions to be brought within five years, to which plaintiff filed a replication averring that defendant fraudulently concealed from plaintiff the fraud constituting her cause of action, to which defendant filed a rejoinder denying any fraudulent concealment. The cause went to trial on these issues.

From the evidence it appears that on July 25, 1921, the Soap Company made a \$250,000 issue of bonds secured by a mortgage on real estate in Chicago, Illinois. The bonds on their face stated that they were secured by a first mortgage on buildings and machinery located at 2335-37-39 Austin Avenue, Chicago. These bonds were not first mortgage bonds but were secured by a junior mortgage, there being a first mortgage of \$28,000 against the property. In July, 1921, Bruno F. Kowalewski was president of both the Soap Company and the defendant bank which was incorporated

to the plaintiff, the defendant represented that the bonds were
secured by a first mortgage and offered to sell same at said price
to plaintiff; that on June 11, 1900, plaintiff, relying upon said
false and fraudulent representations, purchased from defendant bonds
of the par value of \$1,000; that the representations made by defendant
that the bonds were secured by a first mortgage upon said real
estate were true and defendant knew at the time it sold said bonds
to plaintiff that said bonds were not secured by a first mortgage and
it knew that said bonds were secured by a junior mortgage upon said
real estate. To the fraud committed defendant filed the genuine issue,
a special plea of the defense of limitation requiring such action
to be brought within five years, and seven other special pleas. To
the plea of the defense of limitation, plaintiff filed a demurrer,
which was sustained. In the second plea the defendant filed the
genuine issue and also pleaded the defense of limitation, requiring
such action to be brought within five years, to which plaintiff
filed a demurrer sustained. This defendant's pleading was sustained
from plaintiff the fraud constituting her cause of action, to which
defendant filed a demurrer requiring such action to be brought within
five years to be tried as a matter of fact.

From the evidence it appears that on July 22, 1902, the
Coop Company made a first mortgage upon said real estate, which
was duly recorded in the public records. The bonds in question
issued that they were secured by a first mortgage on building
and machinery located at 2115-2117 North Avenue, Chicago, Illinois. These
bonds were not first mortgage bonds but were secured by a junior
mortgage, thus being a first mortgage of \$1,000 against the
property. In July, 1902, James T. MacFarland was president of said
the Cook Building and the defendant bank which was incorporated

January 5, 1921. On June 8, 1922, plaintiff purchased of the defendant bank the bonds in question through one Mary A. Lew, who was then a clerk employed by the defendant bank, who told plaintiff that the Soap Company bonds were secured by a first mortgage. Thereafter, as the semi-annual interest became due on the bonds plaintiff presented the coupons or interest notes to the bank and received payment until January 25, 1925, when it was discovered that the bonds were secured by a second mortgage on the property. There was a foreclosure suit of the first mortgage, to which plaintiff here was a defendant and proved up her bonds before the master, and on the sale of the property received her proportionate share of the proceeds after the payment of the first mortgage.

The questions arising upon this record are precisely the same as those which arose in Skrodzki v. Sherman State Bank, 261 Ill. App. 16, except that in that case, the cause proceeded to trial on one count only, that count being identical with the second count in the instant case. In that case the court held there was no proof of fraudulent concealment as required by section 22 of the Statute of Limitations and reversed the cause. Our Supreme court affirmed the judgment of the Appellate court. (Skrodzki v. Sherman State Bank, 348 Ill. 403.) In the instant case plaintiff contends that the ten year Statute of Limitations applies, which point was not raised in the Skrodzki case, supra.

Plaintiff is not suing on the bonds in assumpsit, but has brought an action in case, and is relying exclusively upon the written contract by which she purchased the bonds, and the representation in the bond that it was a first mortgage bond. The written contract states only that plaintiff bought from defendant the bonds in question. In arguing for an affirmance, plaintiff's counsel

January 2, 1931. On June 2, 1932, Plaintiff purchased of the defendant bank the bonds in question through one J. A. Lee, who was then a clerk employed by the defendant bank. Plaintiff testified that the bonds were covered by a first mortgage. Thereafter, as the semi-annual interest became due on the bonds Plaintiff presented the coupons or interest notes to the bank and received payment until January 22, 1932, when it was discovered that the bonds were covered by a second mortgage on the property. There was a foreclosure sale of the first mortgage, to which Plaintiff bore a debt and the proceeds were applied to the debt, and on the sale of the property received the proceeds ahead of the proceeds after the payment of the first mortgage.

The defendant claims that this record was given to Plaintiff and that on June 2, 1932, Plaintiff received the same. Plaintiff denies this. Plaintiff testified that on June 2, 1932, she was in the bank and saw the bonds and the coupons and that she was told by the bank that the bonds were covered by a first mortgage. Plaintiff testified that she was told by the bank that the bonds were covered by a first mortgage and that she was told by the bank that the bonds were covered by a first mortgage. Plaintiff testified that she was told by the bank that the bonds were covered by a first mortgage and that she was told by the bank that the bonds were covered by a first mortgage.

Plaintiff is not suing on the bonds in question, but has sought an order to set aside the foreclosure sale and to have the bonds sold by the bank. Plaintiff testified that she was told by the bank that the bonds were covered by a first mortgage and that she was told by the bank that the bonds were covered by a first mortgage. Plaintiff testified that she was told by the bank that the bonds were covered by a first mortgage and that she was told by the bank that the bonds were covered by a first mortgage.

states that all of the evidence was in writing and that as no parol evidence was necessary to establish the liability of the defendant, except proof that the written representation contained in the bond was not true, plaintiff's cause of action was within the ten year Statute of Limitations. We believe the authorities under the facts in the instant case are against this contention.

Section 15, ch. 83, Cahill's Ill. Rev. Stats. (Statute of Limitations), provides: "Actions on unwritten contracts, express or implied, * * * and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Section 16 of the same Act provides in part: "Actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued."

A written contract is one in which all of its terms are in writing; a contract partly in writing and partly oral is in legal effect an oral contract. If parol evidence must be introduced to sustain the action the contract is not in writing under this statute. (Conductors' Benefit Ass'n v. Loomis, 142 Ill. 560.)

In support of plaintiff's contention Jassey & Co. v. Horn, 64 Ill. 379, Schalucky v. Field, 124 Ill. 617, and Jones v. Knights of Honor, 236 Ill. 113, are cited. We have examined these cases and find they are distinguishable from the case at bar.

In Jassey & Co. v. Horn, ^{Horn} ~~supra~~ sued defendants in assumpsit. As evidence of the indebtedness, Horn introduced in evidence a depositor's bank book, kept in the usual form, in which the defendants as bankers had made entry of the amounts of money deposited and drawn out by Horn. It was held that the account evidenced by the bank book was an indebtedness in writing within the meaning of the statute.

stated that all of the evidence was in writing and that as no
part evidence was necessary to establish the liability of the
defendant, except that the written representation contained
in the book was not true, plaintiff's action of action was within
the ten year statute of limitations. We believe the submission
under the facts in the instant case are against this contention.
Section 11, Art. 10, Illinois' Civil Code of Procedure provides
of limitations, "Actions on written contracts, express
or implied, and all civil actions not otherwise provided for,
shall be commenced within five years next after the cause of action
accrued." Section 12 of the same act provides in part "Actions
on bonds, promissory notes, bills of exchange, written contracts,
written contracts, or other evidence of indebtedness in writing,
shall be commenced within ten years next after the cause of action
accrued."
A written contract is one in which all of its terms are
in writing; a contract partly in writing and partly oral is in legal
effect an oral contract. If oral evidence may be admitted to
establish the action the contract is not in writing under this statute.
(Conover v. Conover, 123 Ill. 427, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 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2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535,

Schalucky v. Field, supra, was an action in assumpsit brought by a depositor of a bank against a stockholder in which the court held that the bank book issued by the bank created a liability against the bank and that it also created a written liability against the stockholder, and the written indebtedness of the Statute of Limitations was held to apply.

Jones v. Knights of Honor, supra, was also an action in assumpsit for recovery on a life insurance policy payable to the wife of the insured. The wife died before the insured. In the policy was a provision that in that event the proceeds should be payable to his heirs. The insured having died, the heirs sued and introduced oral proof of their heirship. The court held that it was a written contract, although it was necessary to make oral proof of the heirship.

Substantially the identical argument made by plaintiff's counsel in the instant case was made in Knight et al. v. St. Louis I. M. & N. Ry. Co., 141 Ill. 110, and in disposing of the contention the court said (p. 115): "It is not enough that the evidence by which the cause of action is supported is in writing."

In Bates v. Bates Machine Co., 230 Ill. 619, the defendant made a written contract with plaintiff agreeing not to assign certain patents. Defendant breached the contract by assigning the patents. Plaintiff sued in case for damages. Defendant filed a plea of the five year Statute of Limitations. Plaintiff, contending that the ten year Statute of Limitations applied, filed a demurrer to this plea, which was sustained. Our Supreme court reversed the cause and in so doing, said (p. 621):

"The usual action brought to recover damages for a breach of contract not under seal is assumpsit, but an action on the case will lie where, at the time of the breach of a written contract, a fraud is also committed upon the other party to the contract by the party violating the contract, and in this case the appellee appears

Robert V. Little, Plaintiff, vs. Bank of America, Defendant.

Plaintiff by a deposition of a bank agent in which

the agent said that the bank agent had a

liability against the bank and that it also created a written li-

ability against the bank, and the written statement of the

liability of the bank was said to apply.

Robert V. Little, Plaintiff, vs. Bank of America, Defendant.

Plaintiff by a deposition of a bank agent in which

the agent said that the bank agent had a

liability against the bank and that it also created a written li-

ability against the bank, and the written statement of the

liability of the bank was said to apply.

Plaintiff by a deposition of a bank agent in which

the agent said that the bank agent had a

liability against the bank and that it also created a written li-

ability against the bank, and the written statement of the

liability of the bank was said to apply.

Plaintiff by a deposition of a bank agent in which

the agent said that the bank agent had a

liability against the bank and that it also created a written li-

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Plaintiff by a deposition of a bank agent in which

the agent said that the bank agent had a

liability against the bank and that it also created a written li-

ability against the bank, and the written statement of the

liability of the bank was said to apply.

Plaintiff by a deposition of a bank agent in which

the agent said that the bank agent had a

liability against the bank and that it also created a written li-

to have waived its right to sue in assumpsit for the breach of the written contract and to have elected to bring an action in case against the appellant for the wrong committed by the appellant in fraudulently and deceitfully assigning and transferring said patents to the Consolidated Steel and Wire Company instead of to it, as it was averred it was his duty to do by virtue of the terms of the written contract of January 23, 1938. The action was therefore not based upon the written contract, but was based upon the fraudulent acts of the appellant in making the assignment and transfer of said patents to said Consolidated Steel and Wire Company, and the only effect of the written contract was to establish a duty from the appellant to the appellee to transfer to it said patents. We think, therefore, that it cannot be said, as is contended by the appellee, that section 16 of the Limitation act, which provides that actions upon 'written contracts, or other ^{negotiable} evidences of indebtedness in writing, shall be commenced within ten years after the cause of action accrued,' applies in this case, but think, as there is no specific provision in the Limitation act which applies to actions on the case for fraud and deceit, the provision found in section 15 of the Limitations act which provides that 'all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued,' is the limitation that must control in this case, and that the court erred in sustaining the demurrer of the appellee to said plea of the Statute of Limitations."

Movatt v. City of Chicago, 292 Ill. 578, was an action in assumpsit to compel the defendant to refund money paid to indemnify it against damages for vacating an alley in accordance with the terms of a written ordinance. Defendant pleaded the five year Statute of Limitations, to which plaintiff's demurrer was sustained. Our Supreme court reversed the trial court, saying (p. 582): "The contract is held by the authorities to be an oral one, as to the Statute of Limitations, if parol evidence is necessary to show that there can be a recovery under the ordinance."

We conclude, since the bonds involved in this case were not signed, guaranteed or indorsed by the defendant but were the bonds of the Polonia Soap Company and it was necessary to introduce parol evidence to make out a case against the defendant, plaintiff's cause of action is governed by section 16 of the Statute of Limitations and that the action upon it was barred in five years, and for the reasons indicated in Skrodzki v. Sherman State Bank, 348 Ill. 403, the judgment in this case will be reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

35551

PAUL H. DAVIS, I. C. ELSTON, Jr.,
T. E. MURCHISON, ARTHUR W. WAKELEY,
RALPH W. DAVIS, GEO. W. HALL,
HERBERT I. MARKHAM, WALTER M.
GIBLIN, and HENRY E. GREENIE, Jr.,
partners doing business as PAUL H.
DAVIS & COMPANY, (plaintiffs),
Appellees,

v.

TROY SMITH, (defendant),
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

267 I.A. 607^{page 2}

MR. PRESIDING JUSTICE KERRER DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit by plaintiffs against Troy Smith to recover the value of 90 shares of Sangamo Electric Company stock. Heard by a jury, and verdict for plaintiffs for \$2970 and judgment on the verdict, from which defendant appealed.

The plaintiffs' amended declaration consisted of the common counts and an affidavit of claim in which it is alleged that plaintiffs' claim is for \$2981.35, the market value of 90 shares of Sangamo Electric Company common stock, by mistake delivered by plaintiffs to defendant. The defendant pleaded non assumpsit and payment, and set forth in his affidavit of merits that on May 9, 1928, he purchased from plaintiffs 100 shares of common stock of Sangamo Electric Company and that he paid plaintiffs the full purchase price therefor, and that on June 9, 1928, plaintiffs delivered to him said certificate for 100 shares. No question arises on the pleadings and defendant's counsel in oral argument stated that defendant relies on only two grounds for reversal; (1) that the court erred in the admission of evidence, and (2) that the verdict and judgment is clearly and manifestly against the weight of the evidence.

The plaintiffs' evidence discloses that they are stock brokers, members of the Chicago and New York Stock Exchange; that May 9, 1928, defendant gave Arthur Kuhn, one of plaintiff's employes known as a "customers' man," who waited on defendant every time he came to plaintiffs' office, an order to purchase 10 shares of the common stock of Sangamo Electric Company at the market, and the order was executed and the stock purchased at 39-5/8, or at the net price of \$398.25, and a written confirmation of the purchase was made to the defendant and defendant's account charged on May 10, 1928, with \$398.25, and his account was then long 10 shares of Sangamo Electric Company stock. June 4, 1928, plaintiffs had issued and delivered to defendant 100 shares of Sangamo Electric Company stock. During the month of June, 1928, plaintiffs discovered a shortage of 90 shares of Sangamo Electric Company stock, but until March, 1930, they were unable to trace the error and the delivery of 90 shares of the stock to defendant; that on March 17, 1930, plaintiffs demanded of defendant the return of 90 shares of the Sangamo Electric Company common stock.

Defendant's version is that May 9, 1928, he ordered the purchase of 10 shares of Sangamo Electric Company stock and was told by plaintiffs' customers' man the stock was going up and was advised to buy more of the stock; that he thereupon changed his order and ordered the purchase of 100 shares; that he did not know whether it was Kuhn to whom he had given the order; that Kuhn was not the only man with whom he traded; that he then went to the Bingle State Bank, obtained \$3400 in thirty \$100 bills and the balance in \$20 bills from his safety deposit box and gave the money to some one at the cashier's window, receiving a receipt for the \$3400, which he destroyed after the certificate for 100 shares had been delivered to him; that he continued to trade with plaintiffs until October 14,

The plaintiff's evidence disclosed that they are stock
holders, members of the Chicago and New York Stock Exchange; that
on 11, 1922, defendant gave them notice, and by plaintiff's

deposition that on 11, 1922, defendant told them that they were
to be paid for plaintiff's stock, in order to purchase 10 shares
of the common stock of Chicago Electric Company at the market, and
that they were to be paid for the stock at 25-3/4, as at the

price of \$25.37, and a notice of intention of the purchase was
made to the defendant and defendant's account charged on May 10, 1923,
for \$250.37, and the account was then paid to shares of Chicago
Electric Company stock. On 11, 1923, plaintiff had found the

shares to defendant 100 shares of Chicago Electric Company stock.
During the month of June, 1923, plaintiff discovered a shortage of
shares of Chicago Electric Company stock, and called upon the
company to make good the shortage and the delivery of 90 shares of
the stock to defendant; that on June 17, 1923, plaintiff demanded

defendant the return of 90 shares of the Chicago Electric Company
stock.

Defendant's version is that May 27, 1923, he ordered the
return of 10 shares of Chicago Electric Company stock and was
told by plaintiff's secretary, that the stock was being up and was
being to pay more of the stock; that he thereupon changed his

order and ordered the purchase of 100 shares; that he did not know
whether it was known to whom he had given the order; that he then went to the
bank and obtained \$2500 in thirty three bills and the balance
from his safety deposit box and gave the money to some

at the plaintiff's address, receiving a receipt for the money, which
was then given to the plaintiff for 100 shares and were delivered

1929; that before he closed his account with plaintiffs he sold through them 40 or 50 shares of Wanganam Electric Company stock; that after he received the certificate for 100 shares he took it to the transfer agent (not plaintiffs) and had it split up into one certificate of 70 shares, and three certificates of 10 shares each, and later had the certificate of 70 shares issued into smaller units. The first time he heard anything concerning the matter was in March or April, 1930, when a man named Lilly came to his office and said he was trying to trace the stock and inquired if he remembered getting 100 shares of Wanganam Electric Company stock; that he (defendant) told Lilly he had bought the stock and paid for it.

R. L. Glover testified for defendant that in May, 1928, he was employed in the Bings State Bank; that he knew defendant and remembered letting him into the vault in the bank and saw him take some cash out of his box.

In rebuttal John Melshomer testified that he was employed by plaintiffs as cashier in May, 1928; that defendant had not paid to him on May 9, 1928, or at any other time \$3400. On cross-examination he testified that he had been in the employ of plaintiffs since 1920; that in May, 1928, he had eight assistants and that there were three windows in the cashier's cage; that he did not work in all three cages; that tellers occupied each cage, but he had supervision over them.

Arthur J. Lilly testified that he is plaintiffs' office manager, and on March 17, 1930, at defendant's office he asked defendant if he could show how he paid for the stock and he said he could not recall; that defendant admitted buying 10 shares, then denied it, and then said he could not remember whether it was 10 or 100.

1933; that before he signed his account with Hamilton he sold
 through them 10 or 20 shares of Hamilton Electric Company stock;
 that after he received the certificate for 100 shares he took it
 to the transfer agent (not Hamilton) and had it signed up there
 and certificate of 70 shares, and some certificates of 10 shares
 each, and later had the certificate of 70 shares issued into smaller
 units. The first time he heard anything concerning the matter was in
 March or April, 1933, when a man named Kelly came to his office and
 told him he was trying to trace the stock and inquired if he remembered
 selling 100 shares of Hamilton Electric Company stock; that he
 (respondent) told Kelly he had bought the stock and held for it.
 R. L. Glover testified that defendant told him in May, 1933, he
 was employed in the office of the bank and saw him take
 unnumbered letters from him into the vault in the bank and saw him take
 some cash out of his box.
 In October 1933 defendant testified that he was employed
 by Hamilton as a receiver in May, 1933; that defendant had not paid
 him on May 1, 1933, or at any other time since. An examina-
 tion was testified that he had been in the employ of Hamilton
 since 1931; that in May, 1933, he had taken statements and that there
 are three windows in the examiner's office; that he did not work in all
 the windows and seldom occupied each night, but he had supervision
 over them.
 Arthur J. Kelly testified that he is Hamilton's office
 manager, and on March 14, 1933, at defendant's office he asked
 defendant if he could show him how he paid for the stock and he said
 "well, but really that is a long story" and he was not
 at home at that time and he said he would call him later.

The first contention of defendant is that it was error to admit in evidence the "buy order slip" to purchase 10 shares of the Sangamo Electric Company stock. The record discloses that the defendant directed Kuhnien to purchase 10 shares of the common stock of Sangamo Electric Company at the market, and thereupon the "buy order slip" was written by Kuhnien in the presence of the defendant. It was offered in evidence, but before it was received defendant's counsel requested, and was permitted, to cross-examine the witness and during this cross-examination inquired the meaning of certain dates upon the exhibit. At the close of the cross-examination plaintiffs' counsel again offered in evidence the "buy order slip" and defendant's counsel objected on the ground that no proper foundation had been laid for the whole exhibit, defendant's counsel having in mind the fact that Kuhnien had no personal knowledge of the two time stamps appearing thereon. In defendant's brief it is said: "The plaintiffs refused to put in evidence the two time stamps on the back of the Buy Order, and the defendant's attorney had the time stamps read in evidence by one of the witnesses for plaintiffs." From this state of the record we think defendant is in no position to complain of the ruling of the court, nor did the court commit reversible error.

It is also claimed that the court erred in admitting Exhibit B, "Confirmation," advising defendant that plaintiffs had purchased for his account 10 shares of Sangamo, and Exhibits C and D, which were statements of defendant's account with plaintiffs for the months of May and June. It appears from the testimony of H. E. Green, that he was in charge of plaintiffs office and had supervision of the clerical department, books, records and accounts, notices, confirmations and statements, and that he had with him in court the original entry books of plaintiffs, including the customers' ledger which contained all purchases and sales; that the records of May 8

The first condition of defense is that it be proper

to admit in evidence the "my order" slip, as provided in Article

of the Criminal Code, Chapter 100. The second condition is that

the defendant should be allowed to produce in evidence the

order of the court, Chapter 100, and Chapter 101.

"My order" slip, was issued by the court in the presence of the defendant.

It was offered in evidence, and before it was received the court

admitted it, and was admitted, in evidence, and was

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and 2 were made and checked under his direction and supervision; that all records kept in the regular course of business were prepared by him; that the original "buy order" is transcribed into a journal and from the journal into a customers' ledger, and at the end of the month a transcript is mailed to the customer; that Exhibit A is a carbon of the original confirmation sent to the defendant in the regular course of business on May 9; that Exhibits C and D are copies of statements mailed to defendant. Exhibit C shows, among other items, the purchase of 10 shares of Sangamo and that there was due plaintiffs on May 31, 24 cents, and that defendant was long 10 shares of Sangamo. Exhibit D shows that defendant had on June 13, paid 24 cents, and 10 shares of Sangamo had been delivered to him on June 4. Defendant denied he ever received the original of these exhibits. Upon this state of the record we are of the opinion the trial court did not err in its rulings. The main question in the instant case is, did the defendant purchase 10 or 100 shares of Sangamo Electric Company stock, and any evidence tending to prove the fact of the purchase of 10 or 100 shares was competent. These exhibits tended to corroborate the plaintiffs' theory and were competent.

Finally as ground for reversal it is urged the verdict and judgment is not supported by the evidence. The defendant by his plea of payment claimed that he purchased and paid for 100 shares of Sangamo Electric Company stock. Payment was an affirmative defense and the burden was upon him to prove it. The verdict of the jury imports that they did not believe the defendant. Notwithstanding the verdict it is the duty of this court to examine and weigh the evidence and we have carefully examined the evidence and read the record, but this duty does not require nor permit this court to substitute its judgment for that of the jury on a pure

and it was made and observed under the direction and supervision
that all persons kept in the various rooms of treatment were informed
by him that the original "boy" was not to be permitted into a room
and that the "boy" was not to be permitted into a room of the
and a statement is made in the statement; that Exhibit A is a
copy of the original statement made to the defendant in the
regular course of business on May 11; that Exhibit B and C are copies
of statements made to defendant, Exhibit D is a copy, made after
the purchase of 15 shares of company and that there was one
statement on May 11, 1904, and that defendant was paid 15 shares
of company. Exhibit E is a copy of a statement made on June 15, 1904
to, and 15 shares of company had been delivered to him on June 4
defendant denied he ever received the original of these exhibits.
and this state of the record is one of the points the trial court
is not in the evidence. The main question in the instant case
is, did the defendant purchase 15 or 100 shares of company stock?
company stock, and any evidence tending to prove the fact of the
purchase of 15 or 100 shares was competent. These exhibits tended
to establish the defendant's theory and was competent.
Finally as ground for recovery it is urged the verdict
is supported by the evidence. The defendant by
a plea of payment claimed that he purchased and paid for the shares
company. In this regard, the court was not satisfied
to prove and the burden was upon him to prove it. The verdict of
the jury is supported by the evidence and the defendant's testimony
tending the verdict is in the face of the court in evidence and
with the evidence and we have carefully examined the evidence and
of the record, but this court has not found any error in this
and we therefore affirm the judgment for that of the jury in a case

question of fact unless the court can say that the conclusion reached by the jury is palpably wrong. (Welch v. Chicago Railway Co., 195 Ill. App. 146, 152.) In the instant case there was a clear conflict in the evidence and under such circumstances it is the peculiar province of the jury to determine the preponderance and credibility of the evidence. In Mills & Co. v. Duke, 232 Ill. 277, 280, the court said:

"Where the controlling point in the case is supported by the testimony of one witness and contradicted by another witness who, from the reading of the printed page of the record, appears to be equally credible, a court of review is not warranted in disturbing the verdict of the jury, because under the law this court cannot disturb the verdict of a jury unless it is clearly against the manifest weight of the evidence. * * * There are many things which a jury observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review."

See also Bimer v. Miller, 255 Ill. App. 465, 476, and cases cited.

After examining the testimony in this case we are of the opinion that we would not be warranted in holding that the verdict and judgment are against the manifest weight of the evidence.

Finding no reversible error in the record the judgment of the Superior court is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

35686

JOSEPH CALIGARIS and
A. CALIGARIS,
(complainants),
Defendants in Error,

v.

MARY E. MARTIN et al.,
Defendants.

MARY E. MARTIN and
LILLIAN MARION MARTIN,
Plaintiffs in Error.

47 H
ERROR TO

CIRCUIT COURT,

COOK COUNTY.

267 I.A. 607³

MR. PRESIDING JUSTICE KENNER DELIVERED THE OPINION OF THE COURT.

Complainants filed their bill to foreclose a trust deed dated July 1, 1925, executed by Mary E. Martin and Lillian Marion Martin, given to secure their note for \$6,000. Mary E. Martin and Lillian Marion Martin filed their answer to the bill. Builders & Dealers Investment Company filed its answer in the nature of an intervening petition claiming a mechanic's lien. The cause was referred to a master to take testimony and report his conclusions of law and fact. He filed his report in which he recommended that the court enter a decree to foreclose in favor of complainants, and a decree granting a mechanic's lien in favor of Builders & Dealers Investment Company. There is no contest regarding the mechanic's lien claim of Builders & Dealers Investment Company. Objections to the report were ordered to stand as exceptions, which after a hearing were overruled, and on October 19, 1931, the chancellor entered a decree in conformance with the findings and recommendations of the master. The amount found to be due complainants by the decree was \$7,138.28, and to Builders & Dealers Investment Company \$162.31. To

JOHN R. KELLY, JR.
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[unclear]

reverse this decree Mary E. Martin and Millian Marion Martin sued out this writ of error.

The bill alleges that on July 1, 1928, the plaintiffs in error being indebted in the sum of \$6,000, executed their principal note in that amount, payable to their order and by them indorsed and delivered to the defendants in error, and thereby promised to pay defendants in error said \$6,000 on July 1, 1930, with interest at six per cent per annum until maturity, which interest was evidenced by ten interest notes, each for \$180; that to secure the payment of the notes plaintiffs in error executed a trust deed on real estate in Chicago, Illinois, to Chicago Title and Trust Company as trustee. The bill further contained the usual allegations of foreclosure bills and alleged the failure to pay the principal due July 1, 1930. The answer filed by plaintiffs in error admitted the allegations of the bill, but averred that the \$6,000 note was given as a part purchase price for the property involved pursuant to a written agreement entered into prior to the sale of the property, in and by which defendants in error agreed that at the maturity of the note it would be renewed, if desired by plaintiffs in error. The plaintiffs in error had the burden of establishing this defense by clear and convincing proof. (Miller v. Mandel, 259 Ill. 314, 320.)

The evidence discloses that prior to July 1, 1928, defendants in error were the owners of the property and that on that date they conveyed the same by warranty deed to plaintiffs in error, receiving in return therefor \$4,000 in cash, the note and trust deed involved in these proceedings, a first lien upon the property, and another note for \$6,000 payable in sixteen installments of \$100 each, also secured by a trust deed, a second lien on the property. This second trust deed has been paid and is not involved in these proceedings. No mention is made in the warranty deed, the \$6,000 note

reverse this before Mary E. Martin and William Martin Martin were
out this will of error.

The bill alleges that on July 1, 1930, the plaintiff in
error being located in the sum of \$2,000, executed their principal
note in that amount, payable to their order and by them issued
and delivered to the defendant in error, and thereby procured to
pay defendant to their order \$2,000 on July 1, 1930, and interest
at six per cent per annum until maturity, which interest was paid
toward by the defendant in error, and the bill further alleges that the
sum of the notes payable in error executed a short time ago was
located in Chicago, Illinois, at Chicago Title and Trust Company, as
trustee. The bill further contains the usual allegations of tort-
feasance bills and alleges the following to pay the principal and July
1, 1930. The answer filed by plaintiff in error admitted the
allegations of the bill, but averred that the \$2,000 note was given
as a gift without value for the property involved payment to a
written agreement entered into prior to the sale of the property
in and by which defendant in error agreed that of the proceeds of
the note it would be removed; it was also by plaintiff in error. The
plaintiff in error was the master of defendant in error by
deed and conveying deed. (Exhibit A, Exhibit B, and C, etc.)
The evidence discloses that prior to July 1, 1930, certain
note in error were the owners of the property and that in that case
they conveyed the same by warranty deed to plaintiff in error, re-
solving in return therefor \$2,000 in cash, the note and trust deed
involved in these proceedings, a trust deed upon the property, and
another note for \$2,000 payable in sixteen installments at \$100 each,
also secured by a trust deed, a second lien on the property. This
second trust deed was paid full and is not subject to these pro-
ceedings. No mention is made in the warranty deed, the \$2,000 note

or the trust deed now being foreclosed, of any agreement to extend or renew the loan of \$6,000.

The plaintiffs in error testified that some time in June of 1925, they signed a contract, in the presence of George Lewis and W. C. Schlosser (who it is admitted were the real estate brokers instrumental in negotiating the sale of the real estate), relating to the purchase of the premises, and they offered in evidence a contract which they claimed bears their signatures, but which does not bear the signatures of the defendants in error, in which it is said that the \$6,000 note is to be renewed at its maturity if desired by the plaintiffs in error. This contract they claimed is a carbon copy of the original. The plaintiffs in error did not testify that they ever saw defendants in error sign the original contract. George Lewis was deceased at the time of the hearing. W. C. Schlosser testified that he was employed by Lewis as salesman in 1925; that he saw Lewis make three copies of the contract and that these contracts were signed by the plaintiffs in error and defendants in error, and one was delivered to the plaintiffs in error.

Edward R. Neff, an attorney at law, testified that he was present representing defendants in error at the closing of the deal and that there was no agreement to renew the mortgage.

The defendants in error testified that they never signed any papers of any kind regarding the sale of the property except those prepared by Neff, their attorney; that they never signed any contract agreeing to renew the note in question and that nothing was ever said about extending the mortgage. It was upon this state of the record that the master found that the defendants in error had not signed the contract claimed to have been executed.

When a contract is relied upon as modifying the plain and unambiguous terms of a written instrument the evidence must

or the fact that they were not, at any agreement to extend or renew the term of the lease.

The plaintiffs in error testified that some time in June of 1925, they signed a contract, in the presence of George Lewis and W. C. Schlessner (who is in admitted with the real estate business instrumental in negotiating the sale of the real estate), relating to the purchase of the premises, and they elicited in evidence a contract which they claimed bears their signatures, but which does not bear the signatures of the defendants in error, in which it is said that the \$25,000 note is to be removed as the security is desired by the plaintiffs in error. This contract they claimed is a carbon copy of the original. The plaintiffs in error did not testify that they ever saw defendants in error sign the original contract. George Lewis was deceased at the time of the hearing. W. C. Schlessner testified that he was engaged by Lewis as salesman in 1925; that he and Lewis made three copies of the contract and that these copies were signed by the plaintiffs in error and defendants in error, and one was delivered to the plaintiffs in error.

Edward M. Kell, an attorney at law, testified that he was present representing defendants in error at the closing of the deed and that there was no agreement to renew the mortgage. The defendant in error testified that they never signed any papers of any kind regarding the sale of the property except those prepared by Kell, their attorney; that they never signed any contract relating to renew the note in question and that neither was ever sold about extending the mortgage. It was upon this state of the record that the court found that the defendants in error had not signed the contract claimed to have been executed.

There is evidence in this case as to whether the plain and defendants claim to a written document the evidence was not signed the contract claimed to have been executed. There is evidence in this case as to whether the plain and defendants claim to a written document the evidence was not signed the contract claimed to have been executed.

be clear and convincing before a court will depart from the plain language of the written instrument. (Miller v. Mandel, supra.) Here the contract relied upon is not produced. The plaintiffs in error did not testify they ever saw the contract signed by the defendants in error. The only witness who testified that such a contract, as is contended for by the plaintiffs in error, was ever signed, was W. C. Schlosser, who said that three copies of the contract were signed by all the parties and one so signed, was delivered to plaintiffs in error, yet the contract produced by the plaintiffs in error does not bear the signatures of the defendants in error. This testimony goes far to defeat plaintiffs in error's defense.

We think, after reading the evidence carefully, that the plaintiffs in error have failed to sustain the burden placed upon them by law, and that the master's findings, approved by the court on the hearing, are fully supported by the evidence and we would not be warranted in reversing the decree. The master saw and heard the witnesses. A court of review should be slow in disturbing the conclusions of a master upon the facts unless it can be said that his conclusions are clearly contrary to the probative force of the evidence. (Union Colliery Co. v. Fishback, 230 Ill. 165; Gruenenfelder Lumber Co. v. Golden, 260 Ill. App. 313.)

Finding no reversible error the decree of the Circuit court is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

be clear and convincing before a court will depart from the plain

language of the written instrument. (Allison v. Merritt, 1901)

Here the contract relies upon is not promissory, the plaintiff's

error did not result from any error in the contract signed by the

defendant as written. The only error was in the fact that the

contract, as it appeared to be by the plaintiff in error, was never

signed, was it. Defendant who said that three copies of the

contract were signed by all the parties and one so signed, was

delivered to plaintiff in error, but the contract procured by him

plaintiff in error does not bear the signature of the defendant

in error. This testimony goes far to defeat plaintiff's in error's

claim.

It seems, then, that the plaintiff's claim, that

the plaintiff in error was liable to the defendant for the money placed

upon them by law, and that the master's findings, approved by the

court on the hearing, are fully supported by the evidence and are

well and properly sustained by the law. The master's findings

need the witness. A court of review could do so in determining

the conclusions of a master upon the facts which it can be said

that his conclusions are clearly contrary to the preponderance of

the evidence. (Union v. Merritt, 1901, 101)

Defendant's claim that the plaintiff in error was liable to the

plaintiff in error for the money of the plaintiff

is clearly

untenable.

Defendant's claim that the plaintiff in error was liable to the

plaintiff in error for the money of the plaintiff

35711

AGNES SHEKERJIAN,
Complainant,

v.

PAUL SHEKERJIAN,
Defendant.

EDWARD C. GUILMEZ,
(Intervening Petitioner),
Appellant,

v.

AGNES SHEKERJIAN,
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

267 I.A. 607⁴

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

By this appeal the intervening petitioner Edward C. Guilmez, appellant, questions an order of the Circuit court dismissing his petition and denying the relief therein prayed.

December 4, 1931, the appellant moved the court to grant him leave to file his intervening petition for an attorney's lien upon a lump sum alimony award to Agnes Shekerjian, the appellee, and the matter was set for hearing for December 10, 1931, at 3 p. m., at which time the court granted leave to file his petition and re-set the matter for trial for December 11, 1931, at 3 p. m.; on that date appellant presented his petition for change of venue, which was in proper form and duly verified as required by statute, which the court denied, and appellant refusing to offer any testimony in support of his intervening petition it was dismissed.

It is contended that the court erred in denying the change of venue on account of the prejudice of the judge. The petition for the change of venue was drawn and sworn to December 10, 1931, and averred that the prejudice of the judge came to the petitioner's

1911

JOHN HENRIKSEN
Counselor

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JOHN HENRIKSEN
Counselor

EDWARD E. COLLIER
[Intervening Defendant]
Applicant

JOHN HENRIKSEN
Applicant

MR. HENRIKSEN'S INTEREST IN THE MATTER OF THE COURT.

By this appeal the intervening petitioner Edward E. Collier,

appeals, questions in order of the district court granting him

petition and denying the relief therein prayed.

December 14, 1901, the applicant was the first to bring

him into the life of the intervening petitioner for an attorney's firm

and a firm was likewise made to have knowledge, the applicant, and

the matter was not the subject of the hearing in 1901, as it was not

until then the court granted leave to file the petition and to amend

the matter the trial for December 14, 1901, as it was not at that date

applicant presented his petition for change of venue, which was in

order that the case be tried on December 14, 1901, which was the

date, and applicant refused to enter any testimony in support of

his intervening petition as was demanded.

It is contended that the court erred in denying the change

of venue on account of the prejudice of the judge. The petition for

the change of venue was drawn and sworn to December 14, 1901, and

267 I.A. 607

LOCAL NEWS

EDWARD E. COLLIER

JOHN HENRIKSEN

notice December 10, 1931. At 12:45 p. m., December 11, 1931, a notice was delivered to the solicitors for appellee that the appellant would on December 11, 1931, at 3 p. m., apply for a change of venue on account of the prejudice of the judge. It is insisted on the part of the appellee that reasonable notice was not given of the application for the change of venue. The right to a change of venue is absolute where a party brings himself within the provisions of the statute (Walsh v. Ray, 38 Ill. 31, 32; The People v. Scott, 326 id. 327, 341, 342), but the statute (sec. 5, ch. 146, Cahill's Illinois Revised Stats. 1931, p. 2747) requires reasonable notice, and what is reasonable notice is left to the discretion of the judge to whom application is made in the particular case, and this discretion will not be interfered with unless it is abused. (Huston v. Wood, 263 Ill. 376, 381.)

The petition for change of venue in the instant case stated that knowledge of the judge's prejudice did not come to the petitioner until December 10, 1931, but did not state the time in the day when he acquired ^{such} knowledge. The notice was not served until the following day, December 11, 1931, at 12:45 p. m., the case having been set for December 11, 1931, at 3 p. m. In passing upon almost identical facts Mr.

Justice Dunn in Huston v. Wood, supra, said (p. 381): "The notice was not served until late in the afternoon and the case was set for hearing the next day. Whether so short a notice was reasonable was a question to be determined by the court in view of all the circumstances, and we cannot say that he abused his discretion in this regard." (See also Berry v. Wilkinson et al., 1 Scam. 164; Kelly v. Downs, 29 Ill. 74; Gles v. Garrett, 219 id. 208.)

We think there was no abuse of discretion in denying the petition for a change of venue, and the judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

notice December 10, 1931. At 12:45 p.m. December 11, 1931, a
notice was delivered to the solicitor for appellants that the appellants
could on December 11, 1931, at 3 p.m. apply for a change of venue
on account of the proximity of the judge. It is insisted on the part
of the appellants that reasonable notice was not given of the application
for the change of venue. The right to a change of venue is absolute
where a party brings himself within the provisions of the statute.
(Wojcik v. Woycik, 38 Ill. 2d 521, 522; The People v. Woycik, 38 Ill. 2d 527,
528, 529; and the statute itself, Ill. Stat. Ann. (1931) ch. 110, sec. 1-10.)
Notice, 1931, p. 2787) requires reasonable notice, and what is reason-
able notice is left to the discretion of the judge to whom application
is made in the particular case, and this discretion will not be inter-
fered with unless it is abused. (Wojcik v. Woycik, 38 Ill. 2d 527, 528.)
The petition for change of venue in the instant case stated that
knowledge of the judge's proximity did not come to the petitioner until
December 10, 1931, but did not state the time in the day when he
received this knowledge. The notice was not mailed until the following day,
December 11, 1931, at 12:45 p.m., but was served upon the respondent
at 12:45 p.m. on December 11, 1931. In passing upon whether notice was
given in Wojcik v. Woycik, supra, said (p. 527): "The notice was
not served until late in the afternoon and the case was not for hearing
the next day. Whether or not a notice was reasonable was a question
to be determined by the court in view of all the circumstances, and
it cannot say that the notice was unreasonable on this record." (See
also Wojcik v. Woycik, 38 Ill. 2d 527, 528; Wojcik v. Woycik, 38 Ill. 2d 527, 528.)
It is clear that there was no abuse of discretion in denying the
petition for a change of venue, and the judgment is affirmed.
Reversed and granted, 11-11-31.

35721

ALBERT BENNETT,
(plaintiff),
Appellee,

v.

EDWIN H. MANASSE et al.,
Defendants.

EDWIN H. MANASSE,
Appellant.

49 7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 608¹

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Albert Bennett, brought an action in assumpsit to recover \$163 claimed to be due for labor and materials furnished, against Edwin H. Manasse, Henry F. Gierahn, Ida Gierahn and William Schubert. Tried before the court without a jury, resulting in a finding and judgment in favor of plaintiff and against the defendant, Edwin H. Manasse, for \$163, from which he has appealed. Henry F. Gierahn and Ida Gierahn were dismissed out of the case on motion of plaintiff. William F. Schubert was never served with summons. We are not favored with the aid and assistance of a brief on behalf of the plaintiff.

Plaintiff's statement of claim filed February 19, 1931, alleged he was employed by William F. Schubert to furnish labor and materials for decorating a building at 5488 New England avenue, in connection with a contract theretofore made by said Schubert with the owners of said property. July 1, 1931, plaintiff filed an amended statement of claim in which he alleged that he bargained with Schubert for work, labor and materials to be furnished, etc., and that said William Schubert was then a contractor who had entered into a contract with Edwin H. Manasse. August 13, 1931, plaintiff filed a second

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1-12 DE J. C. HAN, JR. WYOMING
-continued-

1. *Journal of the American Medical Association*, 1964; 191: 100-101.
 2. *Journal of the American Medical Association*, 1964; 191: 100-101.

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Signature of holder or authorized agent, dated and signed.

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William Johnson was born in 1800 in the town of Newburgh, New York. He was the son of a farmer and a milliner. He was educated in the common schools of his native town and in the Newburgh Academy. He was a member of the Newburgh Academy and the Newburgh High School. He was a member of the Newburgh Academy and the Newburgh High School. He was a member of the Newburgh Academy and the Newburgh High School.

amended statement of claim in which he alleged that October 18, 1930, he bargained with Edwin H. Manasse for work, labor and materials to be furnished on the premises at 5488 New England Avenue, Chicago, Illinois. The original and the second/^{amended} statement of claim were both verified by the plaintiff. The first amended statement of claim was verified by one M. A. Greenhouse as agent of the plaintiff.

Albert Bennett testified that he worked for defendant at 5488 New England Avenue; that defendant told Schubert to take plaintiff from one of the other jobs and do that building; that the only conversation he had with defendant was after he commenced work at the building when defendant directed him as to how the work was to be done. On cross-examination he testified that he never had a conversation with defendant prior to going to work on the building; that Schubert agreed with him that he (plaintiff) should be paid \$1.50 an hour; that he entered into no contract with defendant for the work. He also testified that January 5, 1931, he served a mechanic's lien notice upon defendant notifying him that he had been employed by William Schubert to furnish labor in and about the decorating under Schubert's contract with defendant on the property at 5488 New England Avenue.

William F. Schubert testified that defendant requested that the work be done and that he and plaintiff went over and did the work. On cross-examination he testified that he made an estimate of \$188 to be paid for the work that was to be done; that it was a question whether he owed plaintiff for the work or whether defendant owed it to him.

Edwin H. Manasse testified that he never hired plaintiff to work for him, but that he did hire William F. Schubert to work for him on the New England Avenue building; that he never agreed to pay plaintiff for any work that he did on the property; that he did

amended statement of claim in which he alleged that October 1934.
1935, he bargained with Edwin H. Kanasa for work, labor and materials
to be furnished on the premises of 2428 New England Avenue, Chicago,
Illinois. The original and the amended statements of claim were both
verified by the plaintiff. The first amended statement of claim
was verified by one M. A. Thompson as agent of the plaintiff.
Albert Bennett testified that he worked for defendant at
2428 New England Avenue; that defendant said Bennett to take plain-
tiff from one of the other jobs and to that building; that the only
conversation he had with defendant was after he commenced work at
the building when defendant directed him as to how the work was to
be done. On cross-examination he testified that he never had a
conversation with defendant prior to going to work on the building;
that Bennett agreed with him that he (plaintiff) should be paid
\$1.50 an hour; that he worked less in contact with defendant than
the work. He also testified that January 2, 1935, he arrived at
mechanic's firm notice upon defendant notifying him that he had been
employed by William Schenck to furnish labor in and about the
decorating under Schenck's contract with defendant on the property
at 2428 New England Avenue.
William T. Schenck testified that defendant requested
that the work be done and that he and plaintiff went over and did
the work. On cross-examination he testified that he made an
estimate of \$120 to be paid for the work that was to be done; that
it was a question whether he owed plaintiff for the work or whether
defendant owed it to him.
Edwin H. Kanasa testified that he never hired plaintiff
to work for him, but that he did hire William T. Schenck to work
for him on the New England Avenue building; that he never agreed to
pay plaintiff for any work that he did on the property; that he did

not deal with him at all.

Francis F. Manasse testified he was present when defendant told Schubert to go to work at 5488 New England avenue.

The defendant seeks to reverse the judgment on the ground that the finding of the court is manifestly against the weight of the evidence. While it is true that the finding of the court as to the facts in the case, where it is tried without a jury, is entitled to the same presumptions as the verdict of a jury and will not be set aside by a court of review unless it is manifestly against the weight of the evidence, yet where, after giving consideration to the variant stories of the witnesses, the reviewing court is of the opinion that the finding is clearly against the weight of the evidence, it is its duty to set aside and reverse the judgment. "A performance of this duty is absolutely essential for the preservation of the rights of citizens and property owners." (C. & E. R. R. Co. v. Mesch, 163 Ill. 305, 308.)

After a careful reading and examination of the entire evidence, we have reached the conclusion that the finding and judgment of the court is manifestly against the weight of the evidence and that justice will be best served by a re-trial of the case. The judgment of the Municipal court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Donlan and Gridley, JJ., concur.

not deal with him at all.

Francis T. Kane was present when defendant

was sentenced to go to work at State Prison.

The defendant asks to reverse the judgment on the ground

that the finding of the court is manifestly against the weight of

the evidence. While it is true that the finding of the court as to

the facts in the case, where it is tried without a jury, is entitled

to the same presumption as the verdict of a jury and will not be set

aside by a court of review unless it is manifestly against the weight

of the evidence, yet where, after giving consideration to the various

statements of the witnesses, the reviewing court is of the opinion that

the finding is clearly against the weight of the evidence, it is its

right to set aside and reverse the judgment. "A performance of this

right is absolutely essential for the preservation of the rights of

persons and property owners." (U. S. v. Marsh, 100 U.S. 111.)

(100, 508.)

After a careful reading and examination of the entire

evidence, we have reached the conclusion that the finding and judgment

of the court is manifestly against the weight of the evidence and that

justice will be best served by a reversal of the case. The judgment

of the municipal court is reversed and the case is remanded.

REVEREND AND HONORABLE

County and City, Ill., January.

35730

ROSE CZERNICKI,
(plaintiff),
Appellee,

v.

CHICAGO CITY RAILWAY COMPANY,
et al., (defendants),
Appellants.

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7

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

267 I.A. 608²

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Rose Czernicki, brought suit to recover damages for injuries sustained as a result of a collision between an automobile in which she was riding, driven by Stanley Grzeskowiak, and a street car belonging to defendants. The jury returned a verdict for plaintiff for \$1500, which was reduced by remittitur to \$1000 and judgment was entered thereon, and defendants appealed.

The plaintiff's declaration consisted of four counts. The first count charged that April 26, 1930, while plaintiff was riding in an automobile being driven along Lake Shore drive in Chicago, Illinois, in a southerly direction, defendants so negligently, carelessly and improperly ran and operated a street car along and upon their railroad on the public highways at the point where Lake Shore drive and East Chicago avenue intersect, and that by reason of such negligence said street car violently collided with and ran against said automobile, causing plaintiff to be injured, etc. The second count charged that defendants, by their agents, then and there recklessly, wilfully and wantonly ran and drove said street car against said automobile, and that by reason of the improper and wanton and wilful conduct of defendants, by their servants, said street car violently collided with and ran against said automobile. The third count set up sec. 99 of the General Ordinances of the Commissioners

of Lincoln Park, and alleged that Lake Shore drive at the intersection of East Chicago avenue is a boulevard and that no automatic or other signal devices for the regulation of traffic were installed there; that defendants were driving said street car westerly on East Chicago avenue and negligently failed to bring it to a full and complete stop, as required by said ordinance, but, on the contrary, negligently operated and drove said street car upon and along said East Chicago avenue and upon and across Lake Shore drive without first bringing such street car to a full and complete stop before reaching Lake Shore drive. The fourth count charged that defendants negligently and improperly approached and drove said street car upon and along East Chicago avenue in a westerly direction, upon and across Lake Shore drive, without having said street car under control or its gong sounding. Each count alleged that plaintiff was at all times in the exercise of due care and caution for her own safety. The defendants pleaded the general issue.

It is insisted on the part of defendants that the plaintiff was not in the exercise of ordinary care for her own safety just prior to and at the time in question and that the judgment should be reversed on the ground that the plaintiff was guilty of contributory negligence, and they argue that she saw the street car at all stages of its progress and knew it was crossing the boulevard when there was ample time for the automobile to have been stopped and thus avoid the collision. There is no controversy as to the essential and material facts.

There is a double street car track along Lake Shore drive which runs from the Navy Pier to Ohio street where it turns west to Lake Shore drive. It turns north again and runs along the east side of Lake Shore drive to East Chicago avenue where it turns west, crosses the drive and runs west for many miles. The paved part of Lake Shore drive is 50½ feet wide and Chicago avenue from curb to

of Lincoln Park and alleged that when driven at the intersection of East Chicago Avenue is a boulevard and that no automobile other than a vehicle for the regulation of traffic were included there; that defendants were driving said street car westward on East Chicago Avenue and negligently failed to bring it to a halt and complete stop as required by said ordinance, but, on the contrary, negligently proceeded and drove said street car upon and along said East Chicago Avenue and upon and across Lake Shore Drive without first bringing such street car to a halt and complete stop before crossing Lake Shore Drive. The Court is of the opinion that defendants negligently and imprudently approached and drove said street car upon and along East Chicago Avenue in a westerly direction, upon and across Lake Shore Drive, without first bringing such street car to a halt and complete stop as required by said ordinance, and that such negligence was the proximate cause of the collision.

It is further alleged that defendant was at all times in the exercise of due care and caution for her own safety. The Court is of the opinion that defendant was not in the exercise of due care and caution for her own safety, but was negligent in the exercise of due care and caution for her own safety, and that the judgment should be reversed.

The ground that the plaintiff was guilty of contributory negligence, and they argue that she was the street car at all stages of the case, and that it was crossing the boulevard when there was ample time for the automobile to have been stopped and thus avoid the collision.

There is no controversy as to the material and material facts. There is a dispute as to which street car was upon Lake Shore Drive at the time of the collision. It is shown that the street car was upon Lake Shore Drive at the time of the collision, and that the automobile was upon Lake Shore Drive at the time of the collision.

curb is 44 feet wide. East of the paved part of Lake Shore drive is a grass plot 6 feet in width, and next to that is a bridle path approximately 15 feet wide. The street car track is east of the bridle path. The curve in Chicago avenue is a wide curve. About midnight April 26, 1930, plaintiff was a passenger in a one-seated automobile with a rumble seat in the rear, driven by Stanley Grzeskowiak. Plaintiff was seated at the left of the seat next to Grzeskowiak and Marie, her sister, sitting to the right of plaintiff. The automobile was being driven south on Lake Shore drive at the rate of 15 or 23 miles an hour, 5 or 6 feet from the west curb, and when about 20 feet north of the street car track the driver set his brakes slightly and slowed down to 8 or 10 miles an hour, but collided with the street car which had traveled north along Lake Shore drive and had turned west into Chicago avenue at a speed of 20 miles an hour without stopping before making the turn.

Stanley Grzeskowiak, the driver of the automobile, testified that when he was 50 feet north of Chicago avenue he saw the street car 20 feet south of Chicago avenue, coming north; that he thought it would stop there and he kept going, but the street car did not stop. It went by him and he ran into the street car. The plaintiff was sitting next to him. She did not say anything. No one in the automobile said anything. He further testified he ran into the right front part of the street car, 3 or 4 feet from the front end, just where the door opens back of the front platform, and that at 23 miles an hour he could stop his automobile in 10 or 15 feet.

Plaintiff testified that when she first saw the street car it was about a block away, coming north. It did not stop at the drive but kept on coming real fast, and when they got to Chicago avenue it had gone into the drive - it was near the middle of the

about 10 feet wide. Most of the heavy part of Lake Shore drive is a grass plot 6 feet in width, and next to that is a bridge path approximately 12 feet wide. The street car track is east of the bridge path. The drive in Chicago Avenue is a wide drive. Plaintiff calls 100, 100, Plaintiff was a passenger in a motorized automobile with a couple more in the rear, driven by Stanley Grossman. Plaintiff was seated at the left of the seat next to Grossman and Marie, her sister, sitting to the right of Plaintiff. The automobile was being driven south on Lake Shore drive at the rate of 15 or 20 miles an hour, 5 or 6 feet from the west curb, and when about 20 feet north of the street car track the driver and his father slightly and slowed down to 5 or 10 miles an hour, but continuing with the speed car which had traveled north along Lake Shore drive and had turned east into Chicago Avenue at a speed of 15 miles an hour without stopping before making the turn.

Stanley Grossman, the driver of the automobile, testified that when he was 20 feet north of Chicago Avenue he saw the street car 20 feet north of Chicago Avenue, coming north; that he thought it would stop there and he kept going, but the street car did not stop. It went by him and he ran into the street car. The plaintiff was sitting next to him. She did not say anything. She one in the automobile said anything. He further testified he ran into the right hand part of the street car, 5 or 6 feet from the front end, that where the door opens back of the front platform, and that at 20 miles an hour he could stop his automobile in 10 or 15 feet.

Plaintiff testified that when she first saw the street car it was about a block away, coming north. It did not stop at the time but kept on coming west, and when they got to Chicago Avenue it had gone into the drive - it was near the middle of the

drive, and then the street car hit the automobile, and that she did not say anything concerning the street car to the driver.

The negligence of a driver will not ordinarily be imputed to the person riding with him. (Pienta v. Chicago City Ry. Co., 284 Ill. 246.) But one riding in an automobile is bound to exercise due care and caution for his own safety and to warn the driver of any danger that may arise. His failure to do so, if it contributes to the injury, will be such negligence as will bar him from a recovery. (Elyan v. Chicago City Ry. Co., 230 Ill. 460; Pienta v. Chicago City Ry. Co., 284 id. 246; Griffenhan v. Chicago Rys. Co., 290 id. 390; Lee v. City of Peru, 343 id. 36.)

It was essential for the plaintiff to prove that she was in the exercise of ordinary care for her own safety in approaching and going upon the crossing, and she was not relieved from that duty because she was riding in an automobile. (Opp v. Pryor, 294 Ill. 533.)

Under the facts shown by the evidence in this case it was clearly the duty of plaintiff in the exercise of ordinary care and caution for her own safety in crossing the street to warn the driver of the automobile of the approaching danger. This she did not do. We must therefore hold she was guilty of contributory negligence.

The judgment is reversed and the cause remanded.

REVERSH AND REMANDED.

Granlan and Gridley, JJ., concur.

driver, and when the street car hit the automobile, and that the

did not say anything concerning the street car or the driver.

The negligence of a driver will not ordinarily be imputed

to the person riding with him. (Harris v. Chicago & North

West 111.255.) But one riding in an automobile is bound to exercise

the same care and caution for his own safety and for the driver of any

vehicle that may arise. His failure to do so, if it constitutes

the injury will be such negligence as will not bar a recovery.

Harris v. Chicago & North West 111.255. Chicago & North West

111.255. Chicago & North West 111.255. Chicago & North West

111.255. Chicago & North West 111.255.

It was essential for the plaintiff to prove that she was

in the exercise of ordinary care for her own safety in approaching

and going upon the crossing, and she was not relieved from that duty

because she was riding in an automobile. (Harris v. Chicago & North

West.)

Under the facts shown by the evidence in this case it

was clearly the duty of plaintiff in the exercise of ordinary care

and caution for her own safety in crossing the street to turn the

right of the automobile of the approaching driver. This she did

not do. It was therefore held that she was guilty of contributory

negligence.

The judgment is reversed and the cause remanded.

REVEREND AND HONORABLE

JUSTICE AND CHIEF JUSTICE

35740

BURGE ICE MACHINE CO.,
a corporation, (plaintiff),
Appellee,

v.

RELIGIANNIS BROTHERS, Inc.,
a corporation, (defendant),
Appellant.

57
7
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

267 I.A. 608³

MR. PRESIDING JUSTICE KENNER DELIVERED THE OPINION OF THE COURT.

Action was brought by plaintiff against defendant to recover the balance of the purchase price for the installation of a refrigerating plant. Tried by the court without a jury, resulting in a finding and judgment for plaintiff for \$1,450. This appeal is from that judgment.

The statement of claim sets forth that May 16, 1924, plaintiff entered into a written contract with defendant whereby plaintiff agreed to erect in defendant's premises a refrigerator plant; that the plant was erected and installed; that defendant paid \$400 on account, leaving a balance of \$1,450.

Defendant's amended affidavit of merits admits the execution of the contract, and alleges that the installation of the plant was not in accordance with the contract in that it failed to produce and maintain the guaranteed temperature; that immediately after its installation, and from time to time thereafter, defendant notified plaintiff of the failure of the plant to produce the guaranteed temperatures; that plaintiff endeavored to make necessary changes, but the plant failed to produce the guaranteed temperatures; that defendant continued to operate the



THE COURT OF APPEALS
 IN THE DISTRICT OF COLUMBIA
 IN REPLY TO THE PETITION
 OF THE DISTRICT OF COLUMBIA
 FOR A WRIT OF HABEAS CORPUS
 IN FAVOR OF THE DISTRICT OF COLUMBIA
 AGAINST THE DISTRICT OF COLUMBIA
 IN REPLY TO THE PETITION
 OF THE DISTRICT OF COLUMBIA
 FOR A WRIT OF HABEAS CORPUS
 IN FAVOR OF THE DISTRICT OF COLUMBIA
 AGAINST THE DISTRICT OF COLUMBIA

807 L.A. 608

THE DISTRICT OF COLUMBIA, PETITIONER, V. THE DISTRICT OF COLUMBIA, RESPONDENT.

THE DISTRICT OF COLUMBIA, PETITIONER, V. THE DISTRICT OF COLUMBIA, RESPONDENT.

THE DISTRICT OF COLUMBIA, PETITIONER, V. THE DISTRICT OF COLUMBIA, RESPONDENT.

THE DISTRICT OF COLUMBIA, PETITIONER, V. THE DISTRICT OF COLUMBIA, RESPONDENT.

THE DISTRICT OF COLUMBIA, PETITIONER, V. THE DISTRICT OF COLUMBIA, RESPONDENT.

plant, at defendant's request, for a period of time while plaintiff was making the necessary changes; that plaintiff failed to comply with the terms of the agreement, by reason whereof defendant requested the plaintiff to remove the equipment.

Defendant also filed a statement of claim in which it alleged the facts set forth in its affidavit of merits and that it paid plaintiff \$400 prior to the time when a sufficient test could be made of the refrigerating plant; that it has at all times been willing to return the equipment installed and has offered to permit plaintiff to remove the equipment. Therefore plaintiff became obligated to return the \$400 paid.

Plaintiff filed an affidavit of merits to defendant's statement of claim denying it failed to install the refrigerating plant in accordance with the terms of the contract, and alleged that defendant accepted and used the plant to date of bringing suit.

Plaintiff offered no testimony and the undisputed facts appearing from the evidence offered by defendant are that on May 16, 1924, the parties entered into a contract by which plaintiff agreed to install a refrigerating plant of sufficient ice melting capacity to maintain a temperature in the cooler on the first floor of 35 to 38 degrees Fahrenheit; in the basement cooler of 40 to 45 degrees Fahrenheit; and in the closed type counter a temperature of 40 to 45 degrees Fahrenheit. It was also agreed in the contract that after the plant was started plaintiff would furnish an engineer for two days, and during that period the plant would produce the guaranteed results; at the end of the two days defendant to accept the plant should it produce the guaranteed temperatures, and if it failed defendant was to give plaintiff written notice of such failure, and defendant should have a reasonable time in which to

plaint, at defendant's request, for a review of same which plaintiff was making the necessary changes; that plaintiff failed to comply with the terms of the agreement, by reason whereof defendant requested the plaintiff to remove the equipment.

Plaintiff also filed a statement of claim in which it alleged the facts set forth in the affidavit of service and that it said plaintiff had paid for the use of the equipment for some time and that it was of the foregoing kind; that it was of all times been willing to return the equipment installed and was offered to permit plaintiff to remove the equipment. Defendant plaintiff's motion was granted to return the equipment.

Plaintiff filed an affidavit of service to defendant's statement of claim saying it failed to install the foregoing equipment in accordance with the terms of the contract, and alleged that defendant accepted and used the plant to date of bringing suit.

Plaintiff offered no testimony and the undisputed facts appearing from the evidence offered by defendant are that on May 10, 1904, the parties entered into a contract by which plaintiff agreed to install a refrigerating plant of sufficient capacity to maintain a temperature in the cooler on the first floor of 35 to 40 degrees Fahrenheit; in the basement cooler of 40 to 45 degrees Fahrenheit; and in the closed type cooler a temperature of 40 to 45 degrees Fahrenheit. It was also agreed in the contract that the plant was to be installed within a certain number of days, and during that period the plant would produce the amount required at the end of the two days defendant to accept the plant should it produce the guaranteed temperature, and if it did not defendant was to give plaintiff written notice of such amount, and defendant should have a reasonable time in which to

accomplish the guaranteed temperatures or permit plaintiff to remove its equipment upon refunding to defendant whatever money had been paid on account thereof. The contract price was \$1,850, payable \$200 upon signing of the contract, \$200 upon shipment of the machine, \$200 upon completion of the plant, and the balance to be evidenced by notes of \$200 each, one note payable three months after completion of the plant, one note every three months thereafter until all are paid. \$200 was paid at the execution of the contract, and an additional \$200 was paid prior to the installation of the plant. The plant was installed in June, 1944, under the direction of Fred W. Vogt, a refrigerating engineer employed by plaintiff. The plant did not at any time produce a temperature in the close type counter of 40 to 45 degrees Fahrenheit. Immediately after the installation and continually thereafter until October, 1944, complaints were made as to the temperature in the counter. Thermometer readings were made over a period of four months, during which time the defendant was directed to use the plant; but at no time was the temperature in the counter less than 55 degrees Fahrenheit. The \$200 to be paid on completion of the plant was never paid, nor were the notes provided for by the contract ever executed, the defendant refusing to make the payment or to execute the notes on the ground that the temperature in the counter was not satisfactory, but would sign the notes when the plant was in proper working condition and furnishing temperatures in accordance with the contract.

There was no complaint about the other two units, and the plant did maintain temperatures of 40 to 45 degrees Fahrenheit in the basement cooler, and 35 to 38 degrees Fahrenheit in the cooler on the first floor, and defendant continued to use all of the equipment, in both coolers and in the counter, until October.

1924, when it removed the coils and pipes from the counter, but the plant and equipment were continued in operation and were used for the purpose of cooling the two coolers until about May, 1925, when a new plant was installed, and the plant installed by plaintiff was placed in defendant's basement. After the coils and pipes in the counter were removed and until May of 1925, defendant used the counter, obtaining refrigeration by the use of ice.

The defendant has assigned a number of errors. In the view we take of the instant case it will not be necessary to discuss all of them. At the commencement of the trial of the cause the court ruled that the burden of proof was upon the defendant and required it to proceed with the presentation of the evidence; in so holding, the defendant contends the court erred. We are of the opinion the point is well taken. The contract in question required the plaintiff to furnish and erect a refrigerating plant and guaranteed certain temperatures. Plaintiff, by its statement of claim, averred performance of the contract. The defendant's affidavit of merits denied performance of the contract, thereby putting plaintiff's averment in issue. The rule is that a party suing upon a contract, alleging performance of it, can only recover by proving performance in strict accordance with its terms. (Turner v. Osgood Art Colortype Co., 223 Ill. 629, 637; Fisher v. Johnson et al., 238 Ill. App. 25; Abeles & Tausig L. & T. Co. v. E. G. Side L. Co., 239 Ill. App. 623.) Plaintiff's counsel, however, contends that the defendant waived performance by the use of the equipment. In view of the fact that we have decided that justice will be best served by a retrial of the cause, we shall not discuss this contention of the plaintiff for the reason that even if there was merit in plaintiff's contention it is in no position, under the

First, when it is shown that the engine was not in operation and was used for the purpose of cooling the two boilers until about May, 1947, when a new plant was installed, and the plant installed by plaintiff was placed in defendant's basement. After the boiler and pipes in the basement were removed and until May of 1948, defendant used the basement, according to plaintiff, for the use of a gas.

The defendant has assigned a number of errors in the view we take of the instant case. It will not be necessary to discuss all of them. At the commencement of the trial of the cause the court ruled that the burden of proof was upon the defendant and required it to proceed with the presentation of the evidence in its behalf, the defendant contrary to the court's ruling. We are of the opinion the point is well taken. The contract in question required the plaintiff to furnish and erect a refrigerating plant and

guaranteed certain temperatures. Plaintiff, by its statement of claim, asserted performance of the contract. The defendant's affidavit of denial denied performance of the contract, thereby putting plaintiff's statement in issue. The rule is that a party suing upon a contract, alleging performance of it, can only recover by proving performance in a trial of the cause with its burden. (Tamm v. United States, 281 U.S. 397, 50 S.Ct. 1465, 75 L.Ed. 1081.)

Plaintiff's statement of claim, as set forth in its affidavit, is that it has performed the contract by the use of the equipment. In view of the fact that we have decided that justice will be best served by a reversal of the court, we shall not discuss this contention of the plaintiff for the reason that even if there was merit in plaintiff's contention it is no defense, since the

pleadings, to avail itself of the doctrine of waiver. The plaintiff can only recover when it has fully or substantially performed its contract, or else aver and prove a sufficient excuse for its noncompliance with its conditions. (Hart v. Saraley Manf. Co., 291 Ill. 444; Schillinger Bros. v. Thompson-Tarrett Co., 171 Ill. App. 319, 324.) In Feder v. Midland Casualty Co., 316 Ill. 552, it was said (p. 559):

"The object of a declaration in an action at law is to state the facts constituting the plaintiff's cause of action upon which he relies to recover, so as to enable the defendant to prepare his defense and meet the facts alleged with appropriate evidence. In order to recover the plaintiff must prove the case alleged in his declaration. It is a primary and elementary principle that a plaintiff can recover only on the case made in his declaration. He cannot make one case by his allegations and recover on a different case made by the proof. (Citing cases.) The defendant has a right to know what the plaintiff charges against him in order to properly make his defense and to prevent his being taken by surprise by the evidence at the trial. (Citing cases.) It is a familiar principle of pleading that when the consideration of the defendant's contract is executory, or its performance is to depend on some acts to be done or forbore by the plaintiff, or on some other event, the plaintiff must aver the fulfillment of the condition or show some excuse for the non-performance. (Citing cases.)"

See also Hamilton Co. v. Channell Chemical Co., 327 Ill. 362, 364.

The judgment of the Municipal court will be reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

Individuals, to avoid the risk of being identified as a source of information, should be advised that the information they provide will be kept confidential and will not be used for any other purpose.

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How important is this issue to you? (1-5)

* CHAIRMAN, U.S. COMMERCE

EXHIBIT 11, Vol. 19, No. 1

35759

CASSIE LANDSMAN,
(plaintiff),
Appellant,

v.

SCHIFF TRUST & SAVINGS BANK,
a corporation, et al.,
(defendants),
Appellees.

52 7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 608"

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Cassie Landsman, brought assumpsit against the defendants, Schiff Trust & Savings Bank and West Side Trust & Savings Bank, on an alleged contract to repurchase certain real estate bonds purchased from the Schiff Trust & Savings Bank. The cause was tried by the court without a jury, resulting in a finding for the defendants and a judgment against the plaintiff for costs, and plaintiff appealed.

The second amended statement of claim sets forth that March 6, 1930, plaintiff, at the solicitation of one Schuster, vice president and cashier of Schiff Trust & Savings Bank, purchased three \$1,000 real estate bonds upon the promise of said Schiff Trust & Savings Bank to repurchase said bonds at any time at a discount of 1%; that on or about February 1, 1931, Schiff Trust & Savings Bank fraudulently sold and transferred all of its assets to the West Side Trust & Savings Bank, a corporation, subject to all of the outstanding indebtedness of Schiff Trust & Savings Bank, and that by said purchase the said West Side Trust and Savings Bank assumed all of the obligations of the said Schiff Trust & Savings Bank. The affidavit of merits of the defendant Schiff Trust & Savings Bank denied that it promised to repurchase said

DAVID L. BROWN,
(Plaintiff),
vs.
Applicant.

JOHN T. BROWN & SONS, INC.,
a corporation,
(Defendant),
Applicant.

APPEAL FROM DECISION

COURT OF DECISION

257 I.A. 608

1. The following is the record of the case as presented to the court.

2. The record shows that the defendant, John T. Brown & Sons, Inc.,

the plaintiff, John T. Brown & Sons, Inc., and the defendant,

John T. Brown & Sons, Inc., in an alleged contract to purchase certain

assets owned by the plaintiff from the defendant, John T. Brown & Sons, Inc.,

there was made by the court a finding of fact, resulting in a finding

for the defendant and a judgment against the plaintiff for costs.

and plaintiff appealed.

The record shows that the defendant, John T. Brown & Sons, Inc.,

March 2, 1930, plaintiff, at the solicitation of one defendant,

also president and cashier of John T. Brown & Sons, Inc., purchased

from the plaintiff certain assets upon the promise of said plaintiff

that it would pay to the plaintiff the sum of \$100,000 at any time at a

discount of 10% that on or about January 1, 1931, John T. Brown

& Sons, Inc. fraudulently sold and transferred all of its assets

to the John T. Brown & Sons, Inc., a corporation, which is

all of the outstanding indebtedness of John T. Brown & Sons, Inc.

and that by said purchase the said John T. Brown & Sons, Inc.

has assumed all of the obligations of the said John T. Brown &

Sons, Inc. The plaintiff of record of the defendant John

T. Brown & Sons, Inc. is presented in the record as follows:

bonds. The affidavit of merits of defendant West Side Trust & Savings Bank denied knowledge of any contract between plaintiff and Schiff Trust & Savings Bank whereby plaintiff purchased three \$1,000 bonds from said Schiff Trust & Savings Bank in consideration of an agreement to repurchase the same by said Schiff Trust & Savings Bank; denied that the Schiff Trust & Savings Bank fraudulently sold and transferred all of its assets to the West Side Trust & Savings Bank, but admitted that on February 1, 1931, it purchased the assets of the Schiff Trust & Savings Bank, subject to certain liabilities which it agreed to pay, but denied that it agreed to assume to pay any liability to the plaintiff.

Cassie Landsman testified that March 6, 1930, she had a conversation with Samuel Schuster, as a result of which she purchased of the Schiff Trust & Savings Bank, three \$1,000 bonds and was given a receipt on which was written a promise that the bonds would be taken back at any time she desired to cash them in, at a loss of 1%; that in December, 1930, she went to the Schiff Trust & Savings Bank and requested it to cash in the bonds, at a loss of 1%, but it refused to take them back.

Elias Nieman testified that he was a brother-in-law of plaintiff; that March 6, 1930, he went with her to the Schiff Trust & Savings Bank and talked with Samuel Schuster, the vice president and cashier of the bank, and informed him that plaintiff had \$3,000 to invest for a short time; that she wanted to be in a position to get the money any time she needed it; that Schuster suggested she buy short maturity bonds, which the bank would cash in at any time at 99, or a loss of 1%; that she said she would buy such bonds, and thereupon Schuster called a clerk and told him to bring the Lancaster bonds and a bill; that when the bonds and bill for the sale thereof were handed to plaintiff she told Schuster,

"You told me that I will be able to cash in the bonds at any time I wanted to at 99. I want that written in the bill," and Schuster replied that was all right and he gave the bill to a clerk nearby and told him to write in the bill that the bank would take the bonds back at any time before maturity at 1% off; that that agreement was written upon the bill and that she then purchased the bonds; that before the bill was handed to plaintiff he saw the clerk write upon the bill the words, "We hereby agree to take back the above bonds at any time you desire to cash them in at a discount of 1%." The bill was introduced in evidence and is as follows:

"Plt Ex. 4

Phone Haymarket 3000

BOND DEPARTMENT SCHIFF TRUST & SAVINGS BANK

Under State and Chicago Clearing House Supervision

RESOURCES OVER \$7,000,000.00

ROOSEVELT ROAD, NEAR HALSTED

Chicago, March 6, 1930

No. 9095

SOLD TO MRS. CASSIE LANDSMAN

3210 W. Polk St.

FIRST MORTGAGE REAL ESTATE GOLD BONDS

Loan No. \$3000 Lancaster #65, 91 and 92 Int. \$68.01 from 10/20
\$3068.01

We hereby agree to take back
the above bonds at any time you
desire to cash them in at a
discount of 1%

"You told me that I will be able to cash in the bonds at any time I wanted to at 99. I want that option in the bill," and Webster replied that was all right and he gave the bill to a clerk nearby and told him to write in the bill that the bank would take the bonds back at any time before maturity at 99 off; that that amount was written upon the bill and that the clerk witnessed the bill; that before the bill was handed to Webster he saw the clerk write upon the bill the words, "We hereby agree to take back the bonds at any time you desire to cash them in at a discount of 1%." The bill was introduced in evidence and is as follows:

"Plt Ex. 4

THOMAS H. HARRIS, DEED

DEED TO MRS. CAROL L. HARRIS

CHICAGO, ILL. AND CHICAGO TRADING BANK, CHICAGO, ILL.

RECEIVED BY \$7,000.00

CHICAGO, ILL. MAY 1, 1930

CHICAGO, ILL. MAY 1, 1930

NO. 1000

DEED TO MRS. CAROL L. HARRIS

CHICAGO, ILL. MAY 1, 1930

CHICAGO, ILL. MAY 1, 1930

CHICAGO, ILL. MAY 1, 1930

CHICAGO, ILL. MAY 1, 1930

CHICAGO, ILL. MAY 1, 1930

CHICAGO, ILL. MAY 1, 1930

CHICAGO, ILL. MAY 1, 1930

(Stamped)

SCHIFF
TRUST & SAVINGS
BANK

less C/p #8 detached

\$3068.01

90.00

Safe Investments Since 1892

\$2978.01

PAID

Teller"

He further testified that December 30, 1930, he and plaintiff returned to the bank and requested Schuster to take back the bonds at a loss of one per cent, which the bank refused to do.

Samuel Schuster testified that he was formerly the vice president and cashier of the Schiff Trust & Savings Bank and had known Nieman for six or seven years; that he had no conversation with him or the plaintiff on March 6, 1930, and that he knew nothing about the sale and purchase of the bonds in question; that on March 6, 1930, he was in Florida and did not return to Chicago until March 14 or 15, 1930.

Benjamin L. Cohn testified that the name and address and the figures on the bill introduced in evidence by the plaintiff were in his handwriting, but that the words, "We hereby agree to take back the above bonds at any time you desire and cash them in at a discount of 1%," were not on the bill when he made it; that when he wrote the bill he made a duplicate of it. The duplicate was offered in evidence and is in all respects the same as the original bill except for the words, "We hereby agree to take back the above bonds at any time you desire to cash them in at a discount of 1%," do not appear thereon.

Morris Kaplan testified that he was in the employ of the Schiff Trust & Savings Bank on March 6, 1930, and delivered the bonds and bill in question to plaintiff; that at the time he delivered the bill it did not have thereon the words, "We hereby

(Exhibit)

WILLIAM
WILLIAM & SONS
INC.

WILLIAM & SONS, INC.

1910-11

1911-12

PAID

WILLIAM

On further testimony that William W. Wills, he was admitted to
turned to the bank and requested William to take back the bonds
of a loss of one per cent, which the bank refused to do.

Samuel Johnson testified that he was formerly the vice
president and cashier of the Equity Trust & Savings Bank and had
known William for six or seven years; that he had no conversation

with him on the plaintiff on March 6, 1930, and that he knew
nothing about the sale and purchase of the bonds in question;
that on March 6, 1930, he was in Florida and did not return to
Chicago until March 14 or 15, 1930.

Benjamin E. Dean testified that the name and address and
he signed on the bill instrument in evidence by the plaintiff were
in his handwriting, but that the words, "We hereby agree to take
back the above bonds at any time you desire and cash them in at a
discount of 1%," were not on the bill when he made it; that when
he wrote the bill he made a duplicate of it. The duplicate was

retained in evidence and he in all respects the same as the original
bill except for the words, "We hereby agree to take back the above
bonds at any time you desire to cash them in at a discount of 1%."

A last signed copy.

Martha Kaplan testified that she was in the employ of
the Equity Trust & Savings Bank on March 6, 1930, and delivered
the bonds and bill in question to plaintiff; that at the time he
received the bill it did not have thereon the words, "We hereby

agree to take back the above bonds at any time you desire to cash them in at a discount of 1%;" that at the time he delivered the bonds and bill he kept a duplicate thereof, which was offered in evidence by defendant.

At the close of all the testimony the trial court found that the plaintiff has failed to prove that the defendant agreed to repurchase the bonds in question.

Plaintiff's counsel now contend that the finding and judgment is contrary to the evidence and that the court should have found in favor of the plaintiff.

After a careful examination and consideration of the evidence, including the two exhibits, we have reached the conclusion that there is no merit in this contention. In our opinion, from the testimony and the facts and circumstances in this cause, the trial court could not have made any other findings.

It is also contended that the court erred in excluding evidence offered by the plaintiff. It appears that plaintiff's counsel attempted to introduce in evidence a copy of an agreement between Schiff Trust & Savings Bank and the West Side Trust & Savings Bank, to which objection was made and sustained because it was a copy and not the original. No notice had been served upon defendants to produce the original. Under such circumstances secondary evidence of the contents of a written document is not admissible. (P., C. C. & St. L. Ry. Co. v. Gage, 286 Ill. 213.) But even if the copy of the contract had been admissible, the ruling of the court did not constitute reversible error for the reason that the court found that no agreement had been made by the Schiff Trust & Savings Bank to buy back the bonds and there could not, therefore, have been any obligation to the plaintiff upon the part of the West Side Trust & Savings Bank.

The judgment of the Municipal court is affirmed. AFFIRMED.
Scanlan and Gridley, JJ., concur.

agrees to take back the above bonds at any time you desire to cash them in at a discount of 10% that at the time he delivered the bonds and will be kept a duplicate thereof, which was offered in evidence by defendant.

At the close of all the testimony the trial court found that the plaintiff had failed to prove that the defendant agreed to repurchase the bonds in question.

Plaintiff's counsel now requested that the finding and judgment be annulled in the evidence and that the court should find that the bonds were not repurchased.

Then a witness examination and cross-examination of the witnesses, including the two witnesses, we have reached the conclusion that there is no merit in this contention. In our opinion, from the testimony and the facts and circumstances in this case, the trial court could not have made any other finding.

It is also contended that the court acted in annulling evidence offered by the plaintiff. It appears that plaintiff's counsel attempted to introduce in evidence a copy of an agreement between DeWitt Trust & Savings Bank and the First State Bank.

DeWitt Bank, to which objection was made and sustained because it was a copy and not the original. No notice had been served upon defendant to produce the original. Under such circumstances

admission of the contents of a written instrument is not admissible. (See E. v. E. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

of the copy did not constitute reversible error for the reason that the court found that no agreement had been made by the DeWitt Trust & Savings Bank to buy back the bonds and that such agreement, therefore, have been any objection to the plaintiff upon the

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CARL MOBERG and EMMA MOBERG,
(plaintiffs),

Appellees,

v.

EDWARD McILWAIN,
(defendant),

Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

267 I.A. 608

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action on the case against the defendant to recover damages in connection with a certain exchange of real estate in which the defendant acted as the agent for plaintiffs. A plea of not guilty was filed and the cause was tried before the court and jury, resulting in a verdict in favor of plaintiffs for \$3,000, upon which a judgment was rendered against the defendant. From this judgment defendant has appealed.

It is contended that the declaration, consisting of one count, did not state a cause of action. It alleged in substance that plaintiffs owned certain real estate and were on April 1, 1928, induced by defendant to sign a contract to exchange their property with James T. Ford, for certain other real estate at the value of plaintiffs' property of \$85,000; that on April 25, 1928, the plaintiffs and Ford consummated the transaction pertaining to said exchange of properties; that the defendant was a real estate broker and was employed by plaintiffs as their agent in the negotiation of the contract for exchange of said properties, and the consummation thereof, and that the defendant, after said contract had been signed and before the exchange was consummated, wrongfully, fraudulently and deceitfully altered, or caused to be altered, said document signed by the plaintiffs for the exchange of the properties, without the knowledge, consent or

Handwritten marks and signatures at the top of the page.

LOUISIANA REVENUE
DEPARTMENT, NEW ORLEANS

267 L.A. 608

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 11/14/01 BY 60322
[Signature]

IN, REMAINING TO THE FIRST JUDGE, THE DECISION OF THE COURT.

The Plaintiff's request for relief on the basis of the
allegation to recover damages in connection with a certain judgment

is denied in which the defendant is held to be liable for the same.

The Plaintiff's request for relief on the basis of the
allegation to recover damages in connection with a certain judgment

is denied. The Plaintiff's request for relief on the basis of the
allegation to recover damages in connection with a certain judgment

is denied. The Plaintiff's request for relief on the basis of the
allegation to recover damages in connection with a certain judgment

is denied. The Plaintiff's request for relief on the basis of the
allegation to recover damages in connection with a certain judgment

is denied. The Plaintiff's request for relief on the basis of the
allegation to recover damages in connection with a certain judgment

is denied. The Plaintiff's request for relief on the basis of the
allegation to recover damages in connection with a certain judgment

is denied. The Plaintiff's request for relief on the basis of the
allegation to recover damages in connection with a certain judgment

is denied. The Plaintiff's request for relief on the basis of the
allegation to recover damages in connection with a certain judgment

acquiescence of the plaintiffs, or either of them so to do, so that the effect thereof, as so altered, was that the plaintiffs' property was exchanged for Ford's property at a valuation of \$82,500 instead of \$85,000, and that the defendant wrongfully, fraudulently and deceitfully caused a deed and other documents to be executed by the plaintiffs conveying their property to Ford, thereby causing Ford to pay to the plaintiffs money or property of the value of \$2,500 less than the amount which the plaintiffs would be entitled to, but for the said wrongful, fraudulent and deceitful acts of the defendant, all of which was contrary to the duty of the defendant in that behalf, which acts of the defendant in the premises were for the purpose of inducing the plaintiffs to sell their property at the valuation of \$82,500 instead of \$85,000, and that defendant made such representations and statements to them in the premises as to consummate said fraud and deceit; that the plaintiffs relied implicitly upon the defendant and, believing his representations and statements in the premises to be true, plaintiffs were deceived and defrauded by defendant in the sum of \$2,500.

While it is true that a party is not bound to plead his evidence and that it is only necessary that he plead the ultimate facts, and that any defect and omission in pleadings, in substance or in form, which would have been available on demurrer are cured by verdict where the issues joined are such as necessarily required, on the trial, proof of the facts so defectively stated or omitted, and without which it is not to be presumed that the court would have directed, or the jury would have given, the verdict, nevertheless the declaration must allege all the circumstances necessary to sustain the cause of action. (Hansberry v. Holloway, 332 Ill. 334.) In the instant case it does not appear from the declaration that the plaintiffs suffered a loss, and there is nothing alleged in the declaration

recognition of the plaintiff, or either of them as to her, as

that the effect thereof, as so alleged, was that the plaintiff's

property was exchanged for Bond's property of a valuation of \$25,000

instead of \$25,000, and that the defendant wrongfully, fraudulently

and maliciously caused a deed and other documents to be executed by

the plaintiff whereby said property is sold, thereby causing her

to pay to the plaintiff money on property of the value of \$2,500

less than the amount which the plaintiff would be entitled to, but

for the said wrongful, fraudulent and malicious acts of the defendant;

all of which was contrary to the duty of the defendant in that behalf,

which acts of the defendant in the premises were for the purpose of

enabling the plaintiff to sell their property at the valuation of

\$2,500 instead of \$25,000, and that defendant acted with reprehensible

and malicious intent in the premises as so contended said Bond and

others; that the plaintiff relied justly upon the defendant and,

relying on his representations and statements in the premises as so

contended, plaintiff was deceived and defrauded by defendant in the sum

of \$2,500.

While it is true that a party is not bound to place his

reliance and that it is only necessary that he place the reliance

there, and that any defect and omission in plaintiff's in substance

is in fact, which would have been sufficient to constitute the error

in fact where the former joined and could be necessarily repaired,

the error, great as the error is, is not to be regarded as material,

as without which it is not to be presumed that the court would have

decided, as the jury would have done, the verdict, notwithstanding the

omission must allege all the circumstances necessary to maintain

an action of assumpsit. (Wheeler v. Wheeler, 111 N.H. 124.) In the

present case it has not been alleged that the defendant

acted with intent to defraud, and there is nothing alleged in the complaint

from which it can be seen how the alteration of the contract was injurious to the plaintiffs. Nor are facts alleged from which it may be inferred that it made any difference to plaintiffs or Ford as to what was represented in the contract as to the value of plaintiffs' property; and there is nothing in the declaration to warrant the charge that defendant wrongfully, fraudulently and deceitfully caused the deed to be executed by the plaintiffs. Under such circumstances, we are of the opinion the declaration does not state a cause of action. (Walters v. City of Ottawa, 240 Ill. 259; Beveridge v. Illinois Fuel Co., 283 id. 31; Ramsberry v. Holloway, 332 id. 334.)

The judgment of the Superior court will be reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

[illegible]

* January 1990 ed.

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35789

LAURA D. SCOTT,
Complainant and Cross-Defendant,
Appellant,

vs.

FRANK E. SCOTT,
Defendant and Cross-Complainant,
Appellee.

54
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

267 I.A. 609¹

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

September 25, 1930, Laura D. Scott filed a bill for divorce charging Frank E. Scott with extreme and repeated cruelty. He answered, denying the charge, and filed a cross bill in which he alleged that she indulged in spasms and boisterous temper, in which, with ferocity, rage and fury, she had on several occasions assaulted him without any just cause therefor, and that she had been guilty of extreme and repeated cruelty; that with rage, fury and ferocity she beat, struck, kicked and scratched him; that on or about May 6, 1926, at Los Angeles, she threw a glass of lyceol upon his face and into his left eye; that on or about May 12, 1930, she struck him in the face; that on or about June 19, 1930, she again struck him in the face with a slipper, thereby cutting the skin under his left eye and discoloring the flesh about his left eye, and tore from his body his underwear; that about July 14, 1930, she beat him about the head and face with an umbrella; that about August 15, 1930, she threw a pint glass of water over his clothing and about his shoulders and neck; that September 20, 1930, she violently assaulted him, and with malicious deliberation dug her four finger nails of her right hand into the flesh of his left cheek, and that she has been guilty of other and further vicious assaults upon him, the days on which such assaults occurred not being fresh in his memory; and further alleged that each and all of said acts of cruelty were without any reasonable or just provocation. She answered the cross bill, denying

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WILLIAM H. BROWN, JR.
 President and Vice-President
 of the

7-10-68

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[illegible]

October 15, 1950. Laura D. Gault filed a bill for divorce

Abstracted from J. Appl. Psychol. 68:1, 1983.

best struck, kicked and scratched him; that on or about May 6,
extreme and repeated cruelty; that with wife, Lucy and Loretta she
him without any just cause, reason, and that she had been guilty of
with Loretta, Kate and Mary, who had on several occasions assaulted
alleged that she indulged in obscene and indecent language, in which,
unanswered, denying the charge, and filed a cross bill in which he

1935, at Los Angeles, she fathered a child of illegit and his name was

into his left eye; that on or about May 12, 1957, she struck him

in the fact; that on or about June 18, 1935, she again struck him

body his underwear; that about July 14, 1936, she bent him about the eye and discolored the skin about his left eye, and tore from his in the lace with a zipper, thereby cutting the skin under his left

head and face with an unbroken; last about August 18, 1930, and

and neck; that September 20, 1935, she violently assaulted him, and threw a pint glass of water over his clothing and about his shoulders.

with malicious deliberation and not for the purpose of her friend

of other and former victims meet with him. The days on which

such results occurred not being taken in the money; and further:

and gradually grew yellow to orange pink to red brown and finally

each and every charge of cruelty. After hearing the evidence on the bill and cross bill the chancellor, on October 30, 1931, found that complainant has failed to establish the charges in her bill, and a decree was entered dismissing the bill for want of equity; and the chancellor found that Laura D. Scott was guilty of extreme and repeated cruelty, and granted Frank H. Scott a divorce. From that decree Laura D. Scott appealed.

A decree in chancery granting affirmative relief must be supported by evidence preserved by a certificate of evidence, or by a finding of facts in the decree itself, and no presumption will be entertained that evidence sufficient to sustain the decree, not appearing in the record, was heard. In the instant case there is no certificate of evidence, and the facts recited in the decree are that appellant is a woman of violent and ungovernable temper and on one or more occasions, while angry, has been guilty of extreme and repeated cruelty toward the appellee; that on March 6, 1926, without provocation, she assaulted the appellee and hurled lyceh upon his face and about his head, burning him and causing him great pain; that September 12, 1930, without provocation, she struck him in the face, ordered him out of the house and threatened him with further violence; that June 19, 1930, she struck him in the face with her slipper, cutting the skin on his face; that July 14, 1930, she struck him with an umbrella; that August 15, 1930, she threw a glass of water at appellee, and September 20, 1930, she dug the finger nails of her right hand into his flesh and scratched his face.

Appellant contends that the decree does not recite sufficient facts to sustain the decree. This point is not well taken. It is not necessary that the decree should set out the evidence where the cause is heard in open court on oral testimony. To sustain the decree the recital of the ultimate facts is sufficient.

each and every charge of cruelty. After hearing the evidence on the bill and cross bill the chancellor, on October 26, 1931, found that complainant has failed to establish the charges in her bill, and a decree was entered dismissing the bill for want of equity; and the chancellor found that Lewis D. Scott was guilty of adultery and repeated cruelty, and granted Frank M. Scott a divorce. From last October Lewis D. Scott appealed.

A decree in equity granting affirmative relief must be supported by evidence presented by a certificate of evidence, or by a finding of facts in the decree itself, and no presumption will be entertained that evidence sufficient to sustain the decree, not appearing in the record, was heard. In the instant case there is no certificate of evidence, and the facts recited in the decree are that appellant is a woman of violent and unbecomable temper and on one or more occasions, while angry, has been guilty of extreme and repeated cruelty toward the respondent; that on March 6, 1930, without

provocation, she assaulted the respondent and hurled upon him force and about his head, bruising him and causing him great pain; that September 17, 1930, without provocation, she struck him in the face, ordered him out of the house and threatened him with further violence; that June 19, 1930, she struck him in the face with her fingers, causing the skin on his face; that July 14, 1930, she struck him with an umbrella; that August 18, 1930, she threw a glass of water at respondent, and September 20, 1930, she dug the finger nails of her right hand into his flesh and scratched his

face. Appellant contends that the decree does not recite sufficient facts to sustain the decree. This point is not well taken. It is not necessary that the decree recite all the evidence where the same is heard in open court on oral testimony. To pre-

(French v. French, 302 Ill. 152, 158; Szarowicz v. Szarowicz, 338 Id. 481, 487.) Sufficient ultimate facts do appear in this decree to justify the relief granted.

It is also insisted that the decree should be reversed because certain of the acts of cruelty found by the decree were not alleged in the cross bill. It is not necessary that the acts of cruelty be proved on the exact days alleged in the cross bill. All that is required is that the acts of cruelty be alleged with reasonable certainty as to time and place. The exact day and place of each particular act need not be alleged. (14 Cyc. 666; Wellman v. Wellman, 191 Ill. App. 514.) In the instant case the cross bill alleged that the appellant on or about May 6, 1926, threw a glass of lysel upon the face and into appellee's left eye, and that acts of cruelty occurred on June 19, July 14, August 15, and September 20, 1930, and that she had been guilty of other and further vicious assaults. The decree found the lysel throwing occurred on March 6, 1926, and not May 6, and also found that acts of cruelty occurred on June 19, July 14, August 15, and September 20, 1930, and in addition that on September 12, 1930, appellant, without provocation, struck the appellee in the face. Where there is a general allegation of divers acts of cruelty at other times than those specially mentioned, evidence is admissible to supplement the evidence produced under the specific allegation. (19 C. J. 111, 112; Bobowski v. Bobowski, 242 Ill. 425.) Literal proof of every allegation is not required. Substantial proof of the material allegations is sufficient. (49 C. J. 807, 808 and 814.) Moreover, a variance in the allegations and proof is not fatal unless the variance is material. (Hills v. McMunn, 232 Ill. 468.) The material allegations are the acts of cruelty, not the dates.

It is next urged the decree should be reversed because it found that only two acts of cruelty were without provocation, i. e.,
1926,
March 6, the throwing of the lysel, and September 12, 1930, when

found that only two acts of cruelty were alleged by the victim, i. e.,
 It is well known that the victim should be treated as
 in the allegations and proof is not fatal unless the variance is
 material. (Hill v. Hill, 223 Ill. 432.) The material allega-
 tions are the acts of cruelty, not the harm.
 not required. Substantial proof of the material allegations is
 v. Dobson, 223 Ill. 432.) Actual proof of every allegation is
 required under the specific allegation. (Id. v. Hill, 223 Ill. 432.)
 mentioned, evidence is admissible to substantiate the evidence pro-
 ven of diverse acts of cruelty at other times than those specifically
 attack the allegation in the case. Where there is a general allega-
 tion that on September 17, 1930, appellant, without provocation,
 on June 10, July 14, August 18, and September 30, 1930, and in ad-
 1930, and not May 2, and also found that acts of cruelty occurred
 assaults. The facts found the jury showing occurred on March 4,
 20, 1930, and that she had been guilty of other and further violence
 of cruelty occurred on June 10, July 14, August 18, and September
 of 1930 upon the face and face appellant's left eye, and that acts
 alleged that the appellant on or about May 2, 1930, threw a glass
 Felton, 221 Ill. app. 514.) In the instant case the error will
 each particular act need not be alleged. (Id. v. Hill, 223 Ill. 432.)
 sole certainty as to time and place. The exact day and place of
 that is required in that the acts of cruelty be alleged with reason-
 ability to prove the same. The exact date alleged in the above bill. It
 alleged in the above bill. It is not necessary that the acts of
 cases certain of the acts of cruelty found by the jury were not
 It is also insisted that the facts should be treated as
 to justify the bill granted.

she struck him in the face. That was sufficient. (Bobowski v. Bobowski, 242 Ill. 524.)

It is also contended that since the decree did not find that the act of cruelty of September 20, 1930, was not without provocation, and since the parties resided together as husband and wife up to and including that date, all previous acts of cruelty were condoned. It is sufficient to say that condonation is an affirmative defense and must be pleaded. No such plea was filed by appellant. A defendant cannot avail himself of any matter not stated in his answer, even though it should appear in the evidence. (Kickamp v. Kickamp, 275 Ill. 98; Mitchell v. Glom, 295 id. 150.)

Equally without merit is her claim that the case must be reversed because the chancellor made no finding that she assaulted appellee on several occasions mentioned in the cross bill.

It is finally contended that the acts of cruelty found by the decree did not constitute cruelty within the meaning of the Divorce act, and counsel argues that slight acts of violence by a wife against her husband do not constitute extreme cruelty so long as there is no reason to suppose that he cannot by a reasonable exercise of physical power protect himself and prevent a repetition. It is difficult to define with precision what is and what is not extreme and repeated cruelty. The same act is not the same thing under all circumstances and to all persons. Necessarily, each case must, to a large degree, be judged by itself. (Ward v. Ward, 103 Ill. 477, 483.) Extreme and repeated cruelty, as used in our statutes, has been construed to mean physical acts of violence; bodily harm, such as endangers life or limb; such acts as raise a reasonable apprehension of bodily harm and show a state of personal danger incompatible with the married state. (Trenchard v. Trenchard, 245 Ill. 313, 315.) And the general principles of law are the same whether the suit be instituted by the husband or the wife, but in

the attack in the case. (Hobbs v. Hobbs)

100 Ill. 2d 111, 112.

It is also contended that since the decree was not final at the time of the attack, the decree was not without provision, and since the parties resided together as husband and wife up to and including that date, all previous acts of cruelty were considered. It is sufficient to say that consideration is an affirmative defense and must be pleaded. No such plea was filed by respondent. A defendant cannot avail himself of any matter not stated in his answer, even though it should appear in the evidence. (Hobbs v. Hobbs, 100 Ill. 2d 111, 112.)

Finally without merit is the claim that the case must be reversed because the chancellor made no finding that the respondent appealed on several occasions mentioned in the error bill.

It is finally contended that the acts of cruelty found by the decree did not constitute cruelty within the meaning of the divorce act, and counsel argues that slight acts of violence by a wife against her husband are not sufficient to constitute cruelty. There is no reason to suppose that he cannot by a reasonable exercise of physical power protect himself and prevent a recidivism. It is difficult to define with precision what is and what is not extreme and repeated cruelty. The same act is not the same thing under all circumstances and to all persons. Necessarily, each case must, to a large degree, be judged by itself. (Hobbs v. Hobbs, 100 Ill. 2d 111, 112.) Extreme and repeated cruelty, as used in our statutes, has been construed in most physical acts of violence; bodily harm, even an endangerment of bodily harm and often a state of personal economic deprivation of bodily harm and often a state of personal indignity and insult. (Hobbs v. Hobbs, 100 Ill. 2d 111, 112.) And the general principles of law are the same.

the application of these principles it is necessary to consider the relative rights which the marriage has created, the physical constitutions and temperaments of the parties. (Garrett v. Garrett, 352 Ill. 318, 522.)

Substantially the identical argument made by counsel in this case was made in Teal v. Teal, 324 Ill. 307, and in that case the court held that in a suit by the husband for divorce on the ground of extreme and repeated cruelty, where repeated assaults are shown to have occurred and the wife's conduct is shown to be such as to make it probable that the assaults will continue, the question of the strength of the husband and his ability by constant vigilance and agility to escape injury is not material.

After a careful examination of all the arguments and contentions of appellant's counsel, we are of the opinion the decree should be affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

35819

MORRIS KOVEN,
(complainant),
Appellee,

v.

MARTHA COHEN et al.,
Defendants.

MARTHA COHEN, ROSE KURNICK
and LOUIS FRIEDMAN,
Appellants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

267 I.A. 609²

MR. PRESIDING JUSTICE KRAMER DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill to foreclose a trust deed dated April 3, 1930, executed by Martha Cohen, given to secure her 40 notes aggregating \$4,000. Martha Cohen, Rose Kurnick, J. Kurnick and Louis Friedman answered the bill. The cause was referred to a master to take testimony and report his conclusions of law and fact. He filed his report in which he recommended the entry of a decree in favor of complainant to foreclose the trust deed. Objections to the report were ordered to stand as exceptions which, after a hearing, were overruled, and on November 2, 1931, the chancellor entered a decree in conformance with the findings and recommendation of the master. The amount found to be due complainant by the decree was \$3,325.81, and this appeal followed. No brief for complainant in defense of the decree has been filed in this court.

The bill alleges that on April 3, 1930, Martha Cohen, being indebted to complainant in the sum of \$4,000, executed her 40 promissory notes numbered 1 to 40, for \$100 each. Note number 1 due one month after date and the remaining notes due one each month

203 A. I 722

THE BILL ALLEGES THAT ON APRIL 1, 1931, BUREAU TOLSON, OF INDEBTED TO COMPLAINT IN THE SUM OF \$4,000, & RECEIVED FROM
THE BILL ALLEGES THAT ON APRIL 1, 1931, BUREAU TOLSON,
ONE OF THE ABOVE HAS BEEN FILED IN THIS COURT.

apart in numerical order, with 6 per cent interest payable monthly on the remaining sum unpaid; that to secure the payment of said notes, Martha Cohen executed a trust deed on real estate in Chicago, Illinois to Joseph Rosenstein as trustee. The bill further contains the usual allegations of foreclosure bills and alleged a failure to pay note number 9, with interest due January 3, 1931, and that complainant has declared the remaining unpaid notes immediately due and payable.

The answer of Martha Cohen averred that notes numbered 1 to 8 were punctually paid; that she sent a check for \$115.50 to Alex Warshawsky, to whom notes numbered 1 to 8 had been paid, in payment of note number 9, and he caused it to be returned, stating the amount was not sufficient; that she thereupon, on January 15, 1931, tendered complainant \$116 in cash, which he refused to accept.

The only point in controversy is whether there was a default in the payment of principal and interest due January 3, 1931. The undisputed evidence discloses that on March 6, 1931, Martha Cohen purchased of complainant and Alex Warshawsky the real estate sought to be foreclosed for \$94,500, which was paid by assuming the payment of a first mortgage on the premises for \$62,500; conveying real estate she then owned valued at \$21,000; delivering to complainant and Alex Warshawsky first mortgage gold bonds valued at \$2,000; executing the notes in question, and by the payment of \$5,000 in cash; that after the execution of the 40 notes she paid notes numbered 1 to 8 punctually as they matured to Alex Warshawsky.

Morris Koven testified that note number 9 had not been paid; that on January 31, 1931, he spoke to Martha Cohen about the payment of note number 9 and requested the note and interest be paid.

Martha Cohen's version of the conversation between her

...in numerical order, with a few more interest people nearby
on the remaining one unpaid; that he knows the payment of said notes,
Martin Cohen executed a final note on real estate in Chicago, Illinois,
in 1924, payable to himself. The bill Martin received the same
obligation of the same bill and alleged a failure to pay note
number 2, with interest on January 1, 1925, and that complaint was
deposited the remaining notes immediately due and payable.
The answer of Martin Cohen advised that notes numbered 1
to 3 were previously paid; that she sent a check for \$112.50 to 112
...to whom notes numbered 1 to 3 had been paid, in payment
of note number 2, and he advised it to be returned, asking the amount
was not sufficient; that she thereupon, on January 12, 1925, tendered
complaint for the same, which he refused to accept.
The only point in controversy in whether there was a
...in the payment of the same and Cohen's answer, 1925.
The undeposited evidence disclosed that on March 4, 1921, Martin Cohen
...of complaint and then tendered the real estate sought
to be deposited for \$22,500, which was paid by receiving the payment
of a first mortgage on the premises for \$22,500; everything was
...the then same value of \$22,500; following to complaint
and then tendered first mortgage note valued at \$2,500;
...the notes in question, and by the payment of \$2,500 in
...the bill under complaint.
...as they related to the controversy.
Martin Cohen testified that note number 2 had not been
paid; that on January 12, 1925, he spoke to Martin Cohen about the
payment of note number 2 and requested the note and interest be
paid.

and complainant was that complainant came to her home and was told that Mrs. Rose Friedman, Martha Cohen's mother, was in bed with a broken arm and other injuries; that he asked to see Mrs. Friedman; that he walked into the bedroom and was told by Mrs. Friedman that she had broken her arm; that he then said, "Well how about the payment of that note," and Mrs. Friedman said she was ill; then complainant said, "I will tell you what to do, pay the interest and we will let the principal run;" that Mrs. Friedman inquired what was the interest and was told it was \$15.50; that Mrs. Friedman then said, "We will mail you a check for the interest." The next day a check for \$15.50 was mailed to Warshawsky; it was returned; then a check for \$115.50 was mailed, which was returned on January 15, 1931, with the explanation that the amount was not sufficient; that day, immediately after receipt of the latter returning the \$115.50 check with the explanation that the amount was not sufficient, Martha Cohen obtained \$116 in cash and tendered it to complainant, who refused to accept it, telling her to go to Warshawsky, that "he handled all the dealings;" that she went to Warshawsky and offered him the \$116 in cash and he refused to accept it.

Martha Cohen's testimony was corroborated by the testimony of Rose Friedman, Israel Saikovich, a physician, Charles R. Corbett, vice president of the Ogden National Bank, upon which bank the check for \$115.50 was drawn, and Anna Slavik. Complainant did not deny the testimony of Martha Cohen and Rose Friedman, and there is no denial by complainant and Warshawsky that \$116.00 in cash was tendered before the filing of the bill. In the answer filed by Martha Cohen, and during the hearing before the master, she made legal tender and offered to pay in full, including interest on notes numbered 9, 10, 11 and 12.

The master entirely disregarded the evidence offered

and complaint was that complaint was to the house and was
told that the complaint was to the house and was
with a broken and other injuries; that he asked to see him.
Witness; that he asked to see him and was told by him.
Witness that she had broken her arm; that he then said, "Well
how about the payment of that note," and then witness said she
was told that complaint was, it will still be the same, but
the interest and we will let the attorney pay, that was witness.
Inquired what was the interest and was told it was \$15.00; that was
Witness then said, "We will pay a check for the interest."
The next day a check for \$15.00 was mailed to "witness"; it was
returned; then a check for \$15.00 was mailed, which was returned
on January 15, 1901, with the explanation that the amount was not
sufficient; that day, immediately after receipt of the letter return-
ing the \$15.00 check with the explanation that the amount was not
sufficient, witness called and told him in words and language as to
complaint, she returned to court in court in court in court
testimony, that "the husband of the witness" that she went to
witness and asked him the \$15 in cash and he returned to court
11-
Witness then a testimony was introduced by the attorney
of the witness, James Bellamy, a physician, Charles E. Bellamy,
then president of the Boston Medical Society, men which were the check
for \$15.00 was given, and then witness. Complaints all not deny
the testimony of James Bellamy and James Bellamy, and there is no
doubt of complaint and witness that \$15.00 in cash was returned
before the trial at the trial. In the absence of the witness,
and during the hearing before the master, the master found that
allowed to pay in full, including interest on notes numbered 2, 10,

in behalf of Martha Cohen, and made no finding relative to the conversation and the conduct of Martha Cohen and Jess Friedman on January 3, 1931, and thereafter.

A court of equity is a court of conscience and will not always literally enforce the provisions of a trust deed where to do so would be oppressive and unconscionable. (Trebailes v. Walsh, 239 Ill. App. 544, and cases cited.) Under the facts in the instant case we think it would be oppressive and unconscionable to allow a foreclosure, require defendant to pay large costs and solicitors' fees and permit complainant to declare principal notes 10 to 40, both inclusive, due at once.

Furthermore, where a note and trust deed provide that upon default in the payment of interest, or an installment of principal due, and the owner may at his option declare the whole amount due, the rule is that a tender of payment of the overdue amount before the option to declare the whole debt due has been exercised, cuts off the right to exercise the option. And this is so because the debt does not become due on the mere default in payment, but some affirmative action is necessary by which the creditor makes it known to the debtor that he intends to declare the whole debt due. (26 R. C. L. 563.) The whole debt does not ipso facto become due upon default but the mortgagee has a mere option which he may exercise or waive, and if the mortgagor makes the overdue payment or tenders the overdue payment before the option is exercised, the right to declare the entire indebtedness due is lost. (Jones on Mortgages, Vol. 2, p. 298.) In the instant case the master found that complainant has declared the entire principal and interest immediately due and payable, but he made no finding when and how - nor does the evidence disclose when and how - complainant elected to declare the entire principal and interest due, unless it be assumed

On January 2, 1935, the following was received from the Department of the Interior, Bureau of Land Management, Washington, D. C.:

1947-1948, 1949-1950, 1951-1952, 1953-1954, 1955-1956, 1957-1958, 1959-1960, 1961-1962, 1963-1964, 1965-1966, 1967-1968, 1969-1970, 1971-1972, 1973-1974, 1975-1976, 1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 2689-2690, 26

for this has only been in issue a few days up to now.

There is nothing to be done about it.

It is noted that the above information was obtained from a confidential source who has provided reliable information in the past.

Page 10

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at 6:00 PM. The following is a list of the names of the persons who were present at the meeting:

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

ent. This means that the five million is not a constant but a variable.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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Division of the Department of the Interior, Bureau of Land Management, Washington, D.C. 20240

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Publertal und Jugendliche sollten mit Identität und Geschlechtswissen, das

^a Leaf size and growth habit are similar to those of *Salix glauca*.

1. Evidence of a change in the way the company is run.

that by the filing of the bill complainant so declared. The bill was filed January 16, 1931, and the undisputed evidence discloses that Martha Cohen tendered payment of note number 9 and all interest due complainant on January 15, 1931, before the filing of the bill, and that he refused to accept it, so that under the rules above enounced the tender cut off complainant's right to declare the entire indebtedness due.

The decree of the Circuit court is reversed and the cause is remanded with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan and Gridley, JJ., concur.

that by the filing of this statement as required. The bill
was filed January 14, 1914 and the following persons interested
that include John Anderson member of House Number 9 and all interested
has complaint no account in 1914 before the filing of the bill.
and that the request be made by us that when the bill above
submitted the board was all complaints made to boarders the matter
be referred to the
The report of the board was received and the same
is forwarded with this letter to him as the bill for want of equity.
RECEIVED THE SECRETARY OF THE HOUSE

RECEIVED THE SECRETARY OF THE HOUSE

35939

DONALD J. BENLEY,
(plaintiff),
Appellee,

v.

BENJAMIN E. MINTURN et al.,
(defendants),
Appellants.

56 7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 609³

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Action was brought by plaintiff to recover the difference between the purchase price of 50 shares of Auburn Automobile stock and the market price five days later. Tried by the court without a jury, resulting in a finding and judgment for plaintiff and against the defendant for \$1905, and defendants appealed.

Defendants are stock brokers with offices on LaSalle street, in Chicago; Marcel E. Dey was in their employ as a "customer's man;" Harry A. Baum was in general charge of their offices. Plaintiff commenced trading with defendants on December 17, 1930.

The plaintiff's evidence discloses that he is a practicing attorney at law, and that on February 5, 1931, he directed defendants to purchase for him at the market price, 50 shares of Auburn stock; that defendants executed the order on February 5, 1931, at \$142 a share; that on February 6, about 1:45 p. m. he called at defendants' offices and there one Stone, designated as a "margin clerk," in the employ of defendants, informed him that he (plaintiff) had sold 100 shares of Auburn stock, and plaintiff replied that he had given no authority to sell his Auburn stock. Stone did not testify in denial of this statement; that on Friday, February 7, plaintiff received

JOHN J. WHEAT,
(Plaintiff),
Appellee.

WILLIAM E. KENNEDY et al.,
(Defendants),
Appellants.

STATE OF ILLINOIS

COURT OF APPEALS

257 I.A. 608

MR. JUSTICE JAMES McKEEVER delivered the opinion of the court.

Action was brought by plaintiff to recover the difference between the purchase price of 50 shares of common stock of defendant and the market price five days later. Trial by the court without a jury, resulting in a finding and judgment for plaintiff and against the defendant for \$1705. and defendant appealed.

Defendants are stock brokers with offices in LaSalle

street, in Chicago; Daniel E. Day was in their employ as a

"customer's man"; Henry A. Kahn was in general charge of their

business. Plaintiff commenced trading with defendants on December

17, 1930.

The plaintiff's witness testified that he is a practicing

attorney at law, and that on February 2, 1931, he directed defendant

to purchase for him at the market price, 50 shares of common stock;

that defendant executed the order on February 2, 1931, at \$35 a

share; that on February 6, about 1:30 p. m. he called at defendant's

offices and there one named, designated as a "margin clerk," in the

employ of defendant, informed him that he (plaintiff) had sold 100

shares of common stock, and plaintiff replied that he had given no

authority to sell his common stock. Where did not testify in detail

from defendants a confirmation indicating he had bought 50 shares and had sold 100 shares of Auburn stock; that upon the receipt of this confirmation he called at defendants' offices and spoke to Benjamin E. Minturn, one of the defendants, and told him that he (plaintiff) had purchased 50 shares of Auburn stock, but had not ordered the sale of any Auburn stock and that he wanted his 50 shares returned to and remain in his account until it reached \$185 a share, and that Minturn said: "All right, I will put it back, the 50 shares in your account;" that on Monday, February 10, 1931, he again called at defendants' offices and there accused Dey of fooling around with his account; that Dey admitted the charge, saying, "I thought that stock was going higher and I bought 50 extra shares for you at 153 and she started to go down and I sold the whole 100 shares for you." He further testified that on the next day, Tuesday, he again called at defendants' offices and directed Minturn to sell his 50 shares at \$185 a share, the market then being at \$187 to \$190 a share; that Minturn said he did not have 50 shares of stock in plaintiff's account.

Marcel E. Dey, Harry A. Baum and Benjamin E. Minturn testified on behalf of defendants. Marcel E. Dey testified that on February 5, plaintiff purchased 50 shares of Auburn stock at 142; that February 6, at the opening of the market around 9 a. m., he spoke with plaintiff over the telephone; that about 10 a. m., plaintiff called again over the telephone and was informed Auburn was around 151; that plaintiff directed Dey to sell it at 153; that at 10:30 plaintiff called again and cancelled the order to sell at 153; that about 11:45 he called again and was told the market was strong and looked like it was going higher; that plaintiff then said he might buy 50 shares more of Auburn; that plaintiff then gave an order to

from defendant a communication indicating he had bought 30 shares
and had sold 100 shares of common stock; that upon the receipt of
this communication he called at defendant's office and spoke to
William H. Winston, one of the defendants, and told him that he
(plaintiff) had purchased 30 shares of common stock, but had not
received the sale of any common stock and that he wanted his 30
shares returned to him because in his account until it reached him
3 shares, and that Winston said: "All right, I will get it back, the
3 shares in your account;" that on Monday, February 14, 1933, he
again called at defendant's office and there received 30 shares of common
stock and that Winston said: "I will get it back, the 3 shares, I
thought that stock was going higher and I bought 30 extra shares for
me at 125 and she started to go down and I sold the whole 100 shares
on your." He further testified that on the next day, Tuesday, he
again called at defendant's office and directed Winston to sell his
3 shares at 125 a share, the market then being at 125 1/2 he sold a
share; that Winston said he did not have 30 shares of stock in
defendant's account.

On February 15, 1933, plaintiff purchased 30 shares of common stock at 125 1/2
and February 16, at the opening of the market around 9 a. m., he
sold with plaintiff over the telephone, that about 10 a. m., plaintiff
called again over the telephone and was informed Winston was around 125 1/2
and plaintiff directed him to sell it at 125; that at 10:15
plaintiff called again and cancelled the order to sell at 125; that
about 11:30 he called again and was told the market was strong and
about 12:30 it was going higher; that plaintiff then said he might
if 30 shares were of common stock plaintiff would have no shares in

buy 50 more shares of Auburn at 151 and gave instructions to place a stop loss order at 150-3/4; that at 11:50 plaintiff called again and was told that 50 shares of Auburn had been purchased for him at 150-3/4; that the market then was 151 1/2; that plaintiff called again within half an hour and was told the market had begun to sell off and that Auburn was under 151; that plaintiff then cancelled the stop loss order and directed the sale of 100 shares of Auburn at the market; that about 12:45 plaintiff called again and was told the 100 shares had been sold at 149 1/2; he further testified he left defendants' employ on February 12.

Harry A. Baum testified that he spoke with plaintiff in the offices of the defendants on February 6, around 1:30; that he heard Stone (the margin clerk) say to plaintiff: "I see that you have sold your Auburn, and I want to congratulate you on the profit that you have made;" that plaintiff made no objection or protest to the remark of the margin clerk; that February 7, at about 9:30, he again saw plaintiff, who inquired what the witness thought of the market and was told that the market was going up, but plaintiff replied he thought the market was going down.

Benjamin E. Minturn testified that plaintiff did not on February 10, order or direct the sale of 50 shares of Auburn; that he did not see or speak to plaintiff on that date; that he did not on February 7, tell plaintiff that he would reinstate in plaintiff's account the 50 shares of Auburn stock.

In rebuttal plaintiff testified that he had not called Roy on February 6, until 11:30 a. m.; that on February 6, at 8:50 a. m., John J. Montague, his client, came to his office; that they left together and went to the office of the clerk of the Superior court, and from there to a court room in the Municipal court, where a case in which Montague was a litigant, was pending; that they remained

any more money of Adams as I had and gave instructions to place a stop lane order at 100-2/4; that at 11:00 plaintiff called again and was told that 90 shares of Adams had been purchased for him at 100-2/4; that the market then was 101 1/2; that plaintiff called again within half an hour and was told the market had begun to fall off and that Adams was under 101; that plaintiff then cancelled the stop lane order and directed the sale of 100 shares of Adams at the market; that about 11:45 plaintiff called again and was told the 100 shares had been sold at 100 1/2; no further trading he lost

telephonic; empty on February 10.

Harry A. Kamm testified that he spoke with plaintiff in the witness of the defendant on February 8, around 1:30; that he heard Kamm (the margin clerk) say to plaintiff: "I see that you have sold your shares, and I want to congratulate you on the profit that you have made;" that plaintiff made no objection or protest to the remark of the margin clerk; that February 9, at about 9:30, he again saw plaintiff, who inquired what the witness thought of the market and was told that the market was going up, not plaintiff's opinion he thought the market was going down.

Benjamin M. Kinsman testified that plaintiff did not on February 10, order or direct the sale of 90 shares of Adams; that he did not see or speak to plaintiff on that date; that he did not on February 7, tell plaintiff that he would telephone to plaintiff, Kinsman did not know of Kinsman's stock.

In previous plaintiff testified that he had not called the Kinsman on February 7, until 11:00 A.M. and on February 8, at 1:00 P.M. and 7:00 P.M. Kinsman, his client, came to his office; that they both together and went to the office of the clerk of the Superior court, and then there to a court room in the Municipal court, where a case

there 10 or 15 minutes and then left to go to Judge Lewis' courtroom in the County building, and there they met Harry Montague; that he was in the presence of John Montague and Harry Montague all the time; that he left Judge Lewis' courtroom at 10:30 and went to the office of the clerk of the Probate court and from that office at 11:30 he called Day and inquired what Auburn was doing and was told it was going up.

John J. Montague testified that on February 6 he called at plaintiff's office about 9 a. m., and went with him to a courtroom in the County building, then to the Municipal court where he had a case pending; that they then went to Judge Lewis' courtroom where they met Harry Montague; that during this time plaintiff had made no telephone calls; that he left plaintiff at 10 a. m.

Harry T. Montague testified that on February 6, at about 9:50, he met plaintiff and John J. Montague in the hallway outside of Judge Lewis' courtroom; that plaintiff and the witnesses walked into the courtroom and he saw and heard plaintiff address the court; that he left plaintiff at about 10:30 or 10:45; that he did not see plaintiff use the telephone that morning.

It also appears from the record that plaintiff denied he ever ordered the purchase of the additional shares of Auburn stock and the sale of 100 shares.

It is contended that the court erred in its ruling on the admission of evidence. Day testified that when plaintiff telephoned the various buy, sell and stop loss orders, he immediately made out the orders and signed the name of plaintiff. It is these orders the court excluded. No harmful error resulted therefrom. The orders could not be regarded as an account book of original entries, the entries in which become admissible in evidence when proven under the provisions of sec. 3, ch. 51 of Cahill's Ill. Rev. Stats. They

about 10 or 12 minutes and then left to go to Judge Lewis' courtroom in the County Building, and that they met Harry Montague; that he was in the presence of Judge Lewis and Harry Montague all the time; that he left Judge Lewis' courtroom at 10:30 and went to the office of the Chief of the Probate Court and from that office at 11:30 he called Judge Lewis and inquired what subject was being and was told it was going up.

John T. Montague testified that on February 6 he called at Plaintiff's office about 9 a. m., and went with him to a courtroom in the County Building, then to the Municipal Court where he had a case pending; that they then went to Judge Lewis' courtroom where they met Harry Montague; that during this time Plaintiff had made no sale; those called; that he left Plaintiff at 10 a. m.

Harry T. Montague testified that on February 6, at about 10:30, he met Plaintiff and John T. Montague in the hallway outside Judge Lewis' courtroom; that Plaintiff and the witness walked into the courtroom and he saw and heard Plaintiff address the court; that he left Plaintiff at about 10:30 or 10:45; that he did not see Plaintiff use the Plaintiff's seal.

It also appears from the record that Plaintiff denied he ever entered the presence of the additional names of unknown persons at the sale of 100 shares.

It is contended that the court erred in its ruling on the admission of evidence. They testified that when Plaintiff telephoned to various banks and stop loss orders he immediately made out an order and signed the name of Plaintiff. It is shown under the facts presented. No material error resulted therefrom. The order will not be regarded as an account book of original entries, the entries in which become admissible in evidence when proper notice is presented of the fact of its being a copy of the original.

were not signed by the plaintiff and were mere memoranda which might have been resorted to to aid the memory of a witness, but not as proof of a disputed fact. (Boyd v. Jennings, 46 Ill. App. 290; Cairns v. Hunt, 78 Ill. App. 420; Brooks v. Funk, 85 Ill. App. 431.)

It is also contended that the court erred in refusing to allow defendant to show that plaintiff at the time of the transaction in question was making short trades in other stock, counsel's argument being that because plaintiff sold a certain ^{other} stock short, that fact tended to show the probability of plaintiff having given the defendant the order to sell his Auburn stock. This ruling of the court furnishes no grounds for reversal. The fact that plaintiff was making short trades in other stock is not evidence that he ordered his Auburn stock to be sold, nor did it tend to render any fact in the record probable or improbable. Furthermore, whether the plaintiff was making short trades in another stock was not a material issue in the case, the only issue being whether plaintiff had ordered the sale of the 5 shares of Auburn.

It is next urged that the court based its finding of damages upon the unsworn testimony of plaintiff's counsel. Our examination of the record discloses that the finding of the court was based solely on the legally admitted evidence which showed that the plaintiff purchased 50 shares of Auburn stock at \$142 a share, or \$7100, which were to be sold at \$185 a share, or \$9250, making a difference of \$2150; that plaintiff admitted receiving \$230, which left \$1920 due before the payment of brokerage fees. The judgment was for \$1905. Defendants' point is not well taken.

It is also claimed that if the plaintiff was entitled to recover his measure of damages would be the difference between the sale price at the time the stock was sold and the market price when he was informed that the stock had been sold. In support of this

are not signed by the plaintiff and are not documents which would
have been received by the defendant as the owner of a share, but not as proxy.

It is also contended that the court erred in refusing to

allow defendant to show that plaintiff at the time of the transaction

a question was asking about shares in other stock, defendant's argument
was that plaintiff was not a shareholder at the time of the transaction.

other

order to show the probability of plaintiff having given the defendant
an order to sell his shares. This ruling of the court is manifestly

erroneous. The fact that plaintiff was making such

order in other stock is not evidence that he intended his shares to be
sold, nor did it tend to render any fact in the record probable

or improbable. Furthermore, whether the plaintiff was making such

order in another stock was not a material issue in the case, the

issue being whether plaintiff had received the sale of the

order of shares.

It is next urged that the court based its finding of

fraud upon the known fact of plaintiff's counsel. Our

examination of the record discloses that the finding of the court

is based solely on the legally admitted evidence which showed

that the plaintiff purchased 10 shares of shares stock at \$100 a

share, or \$1000, which were to be sold at \$100 a share, or \$1000,

and a difference of \$1000 was plaintiff's net profit.

\$100, which is \$1000 and before the payment of brokerage fees.

Plaintiff's net profit is not in dispute.

It is also claimed that if the plaintiff was entitled to

return his money, it should have been the difference between the

amount paid for the shares and the net profit received.

contention defendants' counsel cite a number of cases which hold that the measure of damages for the unauthorized sale of stock by a broker is the difference between the amount obtained and the amount for which the owner could have gone into the market and replaced his converted stock within a reasonable time after obtaining knowledge of the sale. There can be no question that is the rule, but under the facts in the instant case we are of the opinion the rule has no application here, because Minturn said he would put back into plaintiff's account the 50 shares which plaintiff directed be sold when the market reached \$135. The evidence shows it did sell above \$135.

It is finally contended that the finding and judgment is clearly against the weight of the evidence. There was a clear conflict in the evidence. The plaintiff testified he gave no order to purchase the additional 50 shares and that he did not order Day to sell, while Day testified to the contrary. The instant case was originally tried by a jury and a verdict was rendered in favor of plaintiff. After a new trial was granted it was tried before the court without a jury. In a case tried by the court without a jury where there is an irreconcilable conflict in the testimony, a court of review will not reverse the judgment of the trial court if the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the judgment. (Barnett v. Caldwell Furniture Co., 195 Ill. App. 510.) Under such circumstances it is the peculiar province of the trial court to determine the preponderance and credibility of the evidence. Where the controlling point in the case is supported by the testimony of one witness and contradicted by another witness who, from the reading of the printed page of the record, appears to be equally credible, a court of review is not warranted in disturbing the verdict of the jury, because under

the law this court cannot disturb the verdict of a jury unless it is clearly against the manifest weight of the evidence. There are many things which a trial court observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. The trial court is in a much better position in such case to determine the truth of the matter in controversy than a court of review. (Hills & Co. v. Luke, 232 Ill. App. 277, 280; Marble v. Marble, 304 Ill. 229; Illinois-Indiana Fair Assn v. Phillips, 241 Ill. App. 454.) After examining and considering the testimony we are of the opinion that we would not be warranted in holding the finding and judgment is contrary to the manifest weight of the evidence.

We think none of the errors assigned calls for a reversal of the judgment and accordingly it is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

35235

MAX HOFFMAN,
Plaintiff in Error;

v.

FRANK E. MAHER, BERNARD W.
SNOW, bailiff of municipal
court of Chicago, and
FRANCIS CORBY, sued as
John Doe,
Defendants in Error.

57 A
ERROR TO CIRCUIT
COURT, COOK COUNTY.

267 L.A. 609

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of replevin to recover possession of a Lincoln automobile, there was a trial without a jury, resulting in the court, on December 24, 1930, finding the issues in favor of the defendant, Francis Corby, and entering judgment that he have the possession of the automobile, or in the alternative that plaintiff pay to him the sum of \$352.35, and costs, and in default thereof that a writ of retorno habendo issue. Plaintiff seeks by this writ of error to reverse the judgment.

The action was commenced on February 1, 1929, and on the same day the sheriff of Cook county, finding the car in the possession of Snow, as bailiff, etc., by virtue of the levy of an execution on a judgment in favor of Corby against Frank E. Maher, took the car and turned it over to plaintiff, taking his receipt therefor. Defendants' undisputed evidence discloses that the Corby judgment against Maher for \$352.35 was entered in the municipal court on November 8, 1928; that execution thereon was issued and placed in the bailiff's hands on November 17, 1928; that upon demand made upon Maher he refused to satisfy it; that on January 30, 1929, the bailiff, by virtue of the execution, levied upon all the right, title and interest of Maher in the car and took possession of it; and that

• 1927 11 25 1927 11 25

STUDIES OF KOREAN
JESUIT DOCUMENTS

900 .A.1 705

[illegible]

In an action of replevin to recover possession of a certain automobile, there was a trial without a jury, conducted in the court, on December 24, 1930, finding the issues in favor of the defendant, Francis Gentry, and entering judgment that he have the possession of the automobile, or in the alternative that plaintiff pay to him the sum of \$135.35, and costs, and in default thereof make a writ of habeas corpus issue. Plaintiff seeks by this writ of error to reverse the judgment.

The action was commenced on February 1, 1935, and on the same day the sheriff of Cook County, Illinois, the car in the possession of Shaw, as plaintiff, was, by virtue of the levy of an execution on a judgment in favor of Corby against Frank E. Maher, took the car and turned it over to plaintiff, taking his receipt therefor. Plaintiff thereafter introduced evidence in support of the Corby judgment against Maher for \$333.75 and entered in the marriage court on November 2, 1935; this execution return was issued and placed in the plaintiff's hands on November 17, 1935; that upon demand made upon Maher he returned to plaintiff the car on January 30, 1936, the plaintiff, by virtue of the execution, laying upon all the rights, title and interest of Maher in the car and back possession of it and that

two days later, on February 1, 1929, the sheriff, by virtue of the replevin writ, took the car from the bailiff's possession.

In plaintiff's declaration he alleged that on January 30, 1929, defendants wrongfully took and wrongfully detain the car, which is of the value of \$1275. Maher was not served and did not appear. On May 4, 1929, the bailiff and Corby (sued as John Dee) filed three amended pleas; (1) non cepit; (2) plea of justification in the bailiff taking the car under the execution on the Corby judgment; and (3) plea that at the time of the issuance and levy of the execution the car was the property of Maher and not the property of plaintiff. To the last two pleas plaintiff filed a replication in which he averred that, at the times of the alleged happenings, there was and still is existing and unreleased of record a chattel mortgage, duly executed, acknowledged and recorded, which is a prior lien on the automobile, and, therefore, the bailiff had no authority to levy said execution.

The chattel mortgage is set out in full in the replication. It is on a printed form filled in in typewriting and contains the usual provisions, is dated December 3, 1928, is signed and sealed by Maher, is duly acknowledged by him, by an attorney, before the then clerk of the municipal court of Chicago on December 4, 1928, and bears the endorsement of the recorder of Cook county, as having been duly recorded on "Dec. 4, 1928." (This date of recording is 17 days after the execution on the Corby judgment was placed in the bailiff's hands). It is stated in the instrument that "Frank E. Maher, mortgager, * * for \$2457 to him paid, * * hereby grants, bargains, sells and warrants to Winter & Hirsch" the car in question (describing it) "to secure the payment of mortgager's chattel mortgage note of even date herewith, for the amount above set forth * * and delivered to the mortgagee, payable as follows:" (Here follows statement that \$204.75 is to be paid one month after date and like amounts from

two days later, on February 1, 1933, the sheriff, by virtue of the tax sale, took the car from the plaintiff's possession. In plaintiff's declaration he alleged that on January 30, 1933, defendant wrongfully took and wrongfully detained the car, which is of the value of \$1250. There was not a word said as to the value of the car. On May 4, 1933, the plaintiff and Corby (and as John Lee) filed three amended pleas: (1) non assent; (2) plea of justification in the plaintiff taking the car under the execution on the Corby judgment; and (3) plea that at the time of the issuance and levy of the execution the car was the property of John and not the property of plaintiff. To the last two pleas plaintiff filed a replication in which he averred that, at the time of the alleged happenings, there was and still is existing and unperfected of record a chattel mortgage, duly recorded, acknowledged and returned, which in a proper place on the automobile, and, therefore, the plaintiff had no authority to levy said execution. The chattel mortgage is set out in full in the replication. It is in a printed form filled in in typewriting and contains the usual provisions, is dated December 3, 1932, is signed and sealed by John, is duly acknowledged by him, by an attorney, before the clerk of the municipal court of Chicago on December 4, 1932, and bears the endorsement of the recorder of Cook county, on having been duly recorded on "Dec. 4, 1932." (This date of recording is in large after the execution on the Corby judgment was placed in the plaintiff's hands). It is stated in the instrument that "Frank E. Mahony, attorney at law, is the attorney for the plaintiff, defendant, herein."

It is to be noted that the instrument is dated December 3, 1932, and is recorded on December 4, 1932, and is acknowledged on December 4, 1932. (This date of recording is in large after the execution on the Corby judgment was placed in the plaintiff's hands). It is stated in the instrument that "Frank E. Mahony, attorney at law, is the attorney for the plaintiff, defendant, herein."

It is to be noted that the instrument is dated December 3, 1932, and is recorded on December 4, 1932, and is acknowledged on December 4, 1932. (This date of recording is in large after the execution on the Corby judgment was placed in the plaintiff's hands). It is stated in the instrument that "Frank E. Mahony, attorney at law, is the attorney for the plaintiff, defendant, herein."

month to month thereafter for 11 additional months.)

In the replication plaintiff further averred that on May 4, 1928, Maher executed "a purchase money conditional sales' contract to Ben T. Wright, Inc., a corporation," on the car; that the chattel mortgage secured the balance of \$2457 on said contract, which had been assigned to Winter & Hirsch, the mortgagees, and which was thereafter on January 30, 1929, assigned by them to plaintiff; that plaintiff "is now the actual bona fide owner and holder of said chattel mortgage note and said conditional sales' contract note;" and that by reason thereof and for the enforcement of plaintiff's right to the possession of the car in question, he brought the present replevin action.

On the trial plaintiff testified in his own behalf and he called as witnesses Ben T. Wright and L. T. Ellis. He also introduced in evidence the conditional sales' contract and the chattel mortgage. Wright, president of the corporation bearing his name, testified that the corporation operated in Chicago a "Ford and Lincoln Sales Agency," which on May 4, 1928, sold Maher the car in question, No. 45466, for the price of \$5,086.07; that Maher made a cash payment and was allowed certain credits, leaving a balance due in the purchase price of \$2815.44; that to evidence this indebtedness Maher executed and delivered on the same day his note, dated May 4, 1928, (introduced in evidence) payable at the office of L. T. Ellis Co., in Chicago, in twelve monthly installments of \$234.62, the first in one month and the last in 12 months after date; that Maher also executed a conditional sales contract with the Wright corporation, which contract was immediately assigned in writing by the Wright corporation to the L. T. Ellis Co.; that both the note and contract were "sold" by the Wright Corporation to the L. T. Ellis Co., a finance company, which "reimbursed" the Wright corporation for the "amount of the

month to month thereafter for 12 consecutive months.

IN THE PRESENCE OF THE COURT AND THE JURY.

At 4:15 p.m. on the 1st day of January, 1934, the following was read:

Contract to Buy F. Wright, Inc., a corporation, on the 1st day of

the 1st day of January, 1934, the balance of \$500.00 on said contract,

which had been assigned to James S. Wright, the mortgagee, and

which was assigned on January 30, 1934, assigned by him to

plaintiff, and plaintiff is now the owner of said property and

holder of said chattel mortgage note and said conditional sales

contract note, and that by reason thereof and by the execution

of plaintiff's right to the possession of the car in question, he

is entitled to the return of the car.

On the 1st day of January, 1934, in his own behalf and for

himself as witness, J. F. Wright and J. S. Wright. He also intro-

duced in evidence the conditional sales contract and the chattel

mortgage. Wright, president of the corporation bearing his name,

testified that the corporation operated in Chicago a "Ford and Lincoln

Auto Agency", which on May 4, 1933, sold to him the car in question,

for \$400.00, the price of \$500.00, and that he made a cash pay-

ment and was allowed certain credits, leaving a balance due in the

amount of \$100.00. That in evidence the testimony of

Wright and delivered on the same day his note dated May 4, 1933,

(introduced in evidence) payable at the office of J. S. Wright Co., in

Chicago, in twelve monthly installments of \$10.00, the first in one

month and the last on 12 months after date; that he also executed

a conditional sales contract with the Wright Corporation, which con-

tracts the property therein is being by the Wright Corporation

to the J. S. Wright Co.; that both the note and contract were "paid"

by the Wright Corporation on the 1st day of January, 1934, and

which "payment" the Wright Corporation for the "amount of the

deal;" and that the witness did not know whether said note had afterwards fully been paid by Maher or not.

The conditional sales contract, on a printed form, was introduced in evidence. It is dated May 4, 1928, and signed by the Wright corporation and by Maher, who is designated as the "Purchaser" of the car. On the back of the instrument is a printed form of "Assignment," signed by the Wright corporation, "per Ben T. Wright, Pres.," and reading: "For value received, the written contract and all right, title and interest of the seller therein and thereunder, and to the property therein described, are hereby sold, assigned and transferred to L. T. Ellis Co., * * and to its successors and assigns this 4th day of May, 1928." The provisions of the contract are those usual in such instruments. One of the provisions is: "To induce the seller to deliver possession of said automobile to the Purchaser before payment in full therefor has been made in cash, the Purchaser covenants and agrees as follows: (1) Title to the automobile in question shall remain in seller and shall not pass or vest in the Purchaser until all installments on said promissory note have been paid in full, * * ."

L. T. Ellis, plaintiff's witness, testified that the L. T. Ellis Co. is in the automobile finance business; that the company bought the conditional sales contract and Maher's note on May 5, 1928, from the Wright Company, paying to it \$2,490.75; that subsequently Maher made six payments on the note and contract, - the last being made on October 22, 1928; that there then was a balance due thereon of \$1407.72; that the deal "was refinanced by Winter & Hirsch on December 4, 1928;" and that then they "took the deal off our hands," - paying us \$1390; that "we transferred the contract and note to them; we sent the contract over, not paid or anything, to them; we gave the contract to them in the condition it is in now." (The contract introduced in evidence does not bear

and that the witness did not know whether said note had

otherwise fully been paid by either or not.

The conditional sales contract, on a printed form, was

introduced in evidence. It is dated May 4, 1928, and signed by the

right corporation and by Mahor, who is designated as the "purchaser"

of the car. On the back of the instrument is a printed form of

"Assignment," signed by the right corporation, "for Ben C. Wright,

res." and reading: "For value received, the within contract and

all right, title and interest of the seller therein and thereunder,

and to the property therein described, are hereby sold, assigned and

transferred to L. T. Willis Co., and to its successors and assigns

this 4th day of May, 1928." The provisions of the contract are

more nearly in such language. One of the provisions is: "To

release the seller to deliver possession of said automobile to the

purchaser before payment in full therefor has been made in cash, the

seller covenants and agrees as follows: (1) Title to the auto-

mobile in question shall remain in seller and shall not pass or vest

in the purchaser until all installments on said promissory note have

been paid in full."

L. T. Willis, Plaintiff's witness, testified that the

L. T. Willis Co. is in the automobile finance business; that the

company bought the conditional sales contract and Mahor's note on

May 4, 1928, from the right company, paying to it \$7,486.75; that

approximately Mahor made six payments on the note and contract.

On that point there was no dispute, and the witness then was

asked how shown of \$1000.75; that the deal "was consummated

by Mahor & Mahor on December 4, 1927," and that they "took

the deal off our hands" - paying as \$1000; that "we transferred

the contract and note to them; we sent the contract note, and paid

nothing, is that we gave the contract to them in the condition

any assignment by the Ellis Co. to Winter & Hirsch.)

No representative of Winter & Hirsch was called as a witness by plaintiff; nor was Frank E. Maher called as a witness.

The plaintiff (Hoffman) testified that his business is that of a "salesman"; that he knows Winter & Hirsch and has had business relations with them; that he purchased from them the chattel mortgage on the automobile in question on January 30, 1929 (i. e., the day the bailiff of the municipal court had levied on the automobile by virtue of the execution on the Corby judgment against Maher, and which execution had been in said bailiff's hands since November 17, 1928); that at the same time he (plaintiff) purchased the chattel mortgage and note from Winter & Hirsch he received the original conditional sales contract and note; that the consideration for said purchase was \$2,057; and that then, Winter & Hirsch owed him \$2,000 and he gave to them the balance of \$57 in cash. Plaintiff also testified that at the same time he received from Winter & Hirsch another paper. This paper (introduced in evidence by plaintiff) is not attached to the conditional sales contract. It is on a letter head of the L. T. Ellis Co., dated January 20, 1929, is in typewriting and signed by the L. T. Ellis Co., and states: "In consideration of \$1 and other valuable assets, we hereby sell, assign and transfer to Winter & Hirsch all our right, title and interest in and to within conditional sales contract, dated May 4, 1928, and signed by Frank E. Maher." Immediately below and on the same sheet of paper is the following undated assignment in typewriting, signed "Winter & Hirsch, by Abe Winter":

"In consideration of \$1 and other good and valuable considerations * * we hereby sell, assign and transfer to Max Hoffman all our right, title and interest in and to the conditional sales contract, and note it secures, as above stated, signed by Frank E. Maher, dated May 4, 1928; and the chattel mortgage on the same Lincoln automobile of Frank E. Maher * * dated December 3, 1928, as additional collateral security on said contract."

any assignment by the Miller Co. to Winter & Hirsch.

No representative of Winter & Hirsch was called as a witness by plaintiff; nor was Frank E. Maher called as a witness.

The plaintiff (Maher) testified that his business is

that of a "salesman"; that he knows Winter & Hirsch and has had

business relations with them that he purchased from them the

conditional mortgage on the automobile in question on January 20, 1933

(i. e., the day the bill of the municipal court had failed on

the automobile by virtue of the execution on the Gorry judgment

against Maher, and which execution had been in said bill of lading

since November 17, 1932; that at the same time he (plaintiff)

purchased the conditional mortgage and note from Winter & Hirsch he

received the original conditional sales contract and note; that the

consideration for said purchase was \$2,000; and that when Winter

& Hirsch owed him \$2,000 and he gave to them the balance of \$25 in

cash. Plaintiff also testified that at the same time he received

from Winter & Hirsch another note - This note is attached to this

complaint by plaintiff; he was attached to the conditional sales contract.

It is on a letter head of the E. F. Miller Co., dated January 20, 1933,

in typewriting and signed by the E. F. Miller Co., and reads: "In

consideration of \$1 and other valuable assets, we hereby sell, assign

and transfer to Winter & Hirsch all our right, title and interest in

and to within conditional sales contract, dated May 6, 1932, and signed

by Frank E. Maher." Immediately below and on the same sheet of

paper as the following signed assignment in typewriting, signed

"Winter & Hirsch, by the latter."

"In consideration of \$1 and other good and valuable

consideration - we hereby sell, assign and transfer to the

plaintiff all our right, title and interest in and to the conditional

sales contract, and note in connection with said contract, signed by

It appears from plaintiff's replication to the special pleas of Corby and the bailiff that plaintiff relied upon said chattel mortgage, recorded December 4, 1928, and which he claimed had duly been assigned to him by Winter & Hirsch on January 30, 1929, and he also stated in the replication that at the time his replevin suit was commenced (February 1, 1929) he not only was the "actual bona fide owner and holder" of the chattel mortgage note (dated December 3, 1928) but also of the conditional sales contract note. After a careful review of the evidence we do not think that he showed by sufficient or satisfactory evidence that he ever was the bona fide owner and holder of said chattel mortgage note, or of said conditional sales contract and note. But, assuming, for the sake of the argument only, that he was the bona fide owner of the chattel mortgage and chattel mortgage note, said mortgage is inferior to the lien of the Corby judgment. The mortgage (executed on December 3, 1928) was recorded on December 4, 1928. The execution on the Corby judgment against Maher was placed in the bailiff's hands on November 17, 1928, and then attached as a lien on all of Maher's property, including the automobile in question. (See Roth v. Snow, 245 Ill. App. 532, 535; Second Nat. Bank v. Gilbert, 174 Ill. 485, 494.) On the trial plaintiff relied on the claim then made by him, and here in this court relies, that he was the actual bona fide assignee of the conditional sales contract of May 4, 1928, which, as he claims, came to him as additional security to the chattel mortgage. In view of all the evidence we do not think there is any merit in the claim or position. It sufficiently appears that Winter & Hirsch, assignee of the conditional sales contract from L. T. Ellis Co. as claimed, elected to enter into a new scheme of financing the balance, which was due from Maher on the automobile. They took the chattel mortgage of December 3, 1928, from him for said balance.

They thereby treated him as the owner of the automobile, subject to said mortgage. This action was inconsistent with any theory that the original conditional sales contract was also still in force. And when, on January 30, 1929, after the bailiff had actually levied on the automobile by virtue of the execution on the Corby judgment, Winter & Hirsch made the purported assignments to plaintiff, as claimed, plaintiff was in no better position than Winter & Hirsch would have been to claim that said original conditional sales' contract was still in existence and had not been superseded by said chattel mortgage.

Our conclusion is that the findings and judgment in favor of the defendant Corby are sufficiently sustained by the evidence and that the judgment against plaintiff, as first above mentioned, should be affirmed. Such will be the order.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

They thereby treated him as the owner of the automobile, subject to said mortgage. This action was inconsistent with any theory that the original conditional sales contract was also still in

effect, and when, on January 27, 1934, after the plaintiff had

actually failed on the automobile by virtue of the execution on the plaintiff's judgment, Winter & Hirsch made the proposed assignments to plaintiff, as claimed, plaintiff was in no better position than Winter & Hirsch would have been to claim that said original conditional sales contract was still in existence and had not been assigned by said conditional mortgage.

One conclusion is that the findings and judgment in favor of the defendant carry no substantial support by the evidence and that the judgment against plaintiff is first error committed. It should be affirmed. There will be no writ.

Very truly,
Your obedient servant,

James M. Larkin, Jr., Attorney

35671

CLARA C. WALKER,
Appellee,

v.

E. SUMNER WALKER,
Appellant.

58 7
APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

267 I.A. 610

MR. JUSTICE CHILNEY DELIVERED THE OPINION OF THE COURT.

In a divorce proceeding in which complainant had obtained a decree of divorce from defendant on January 2, 1929, the court (Judge Trude), on September 23, 1931, entered an order entitled "Order of Commitment," in which, on the return to the rule on defendant to show cause, etc., and having heard testimony and arguments, the court finds:

That by the divorce decree defendant was ordered to pay to complainant, for the support of their two minor children, the sum of \$100 per month; that there is now due to complainant for such support the sum of \$175; that by the decree it was provided that defendant pay to complainant as her alimony the sum of \$18,000, payable in semi-annual installments of \$1,000, commencing January 1, 1929; that there is now due to her thereon the sum of \$5,000; that the provision for the payment of the alimony to her "was by agreement of the parties entered into at the time of the entry of the decree;" and that subsequent to its entry the court, on July 13, 1931, "found that said provision for the payment of alimony is part of the decree herein."

That defendant is now, and has been engaged in the business of buying and selling real estate in Cook county and has been and is maintaining an office wherein to transact his business; that he has been paying \$40 each month for his hotel room; that from his business "he has been in receipt of an income sufficient to have enabled him to have paid to complainant, and to now pay, the sum of \$175 for the support of the children, and the sum of \$5,000 due to complainant for her alimony;" but that "defendant, in willful contempt of this court, has refused and willfully neglected to pay, and now to pay, to complainant said monies now due to her."

And it is ordered and adjudged that defendant be and he is hereby committed to the common jail of Cook county "for a period not to exceed six (6) months, unless he shall sooner pay to complainant, or to the sheriff of Cook county for her use," the said sums of money, "or unless or until he shall sooner be released by due process of law;" etc.

208 I.A. 610

WEEK COUNTY.

THIRD JUDICIAL CIRCUIT COURT.

STATE OF WISCONSIN.

APPEAL.

V.

APPEAL.

IN THE CIRCUIT COURT OF THE COUNTY OF WISCONSIN.

IN A DIVORCE PROCEEDING IN WHICH COMPLAINT WAS RETURNED

ON FEBRUARY 11, 1931, AND WHICH WAS RETURNED ON FEBRUARY 11, 1931, THE COURT

(Judge Thayer), ON SEPTEMBER 22, 1931, ENTERED AN ORDER AFFIRMING

ORDER OF COMMITMENT, IN WHICH, ON THE BASIS OF THE FINDINGS

AND FINDINGS OF FACT, AND FINDINGS OF LAW, THE COURT ENTERED AN ORDER

OF COMMITMENT, THE COURT ENTERED

That by the divorce decree defendant was ordered to pay

a complaint, for the support of their two minor children, the

sum of \$100 per month; that there is now due to complainant for

costs of suit the sum of \$150; that by the decree it was provided

that defendant pay to complainant as her alimony the sum of \$10,000,

payable in semi-annual installments of \$1,000, commencing January 1,

1932; that there is now due to complainant the sum of \$1,000, being that

provision for the payment of the alimony to her "was by agreement

of the parties entered into at the time of the entry of the decree,"

and that defendant to the entry of the decree, on July 12, 1931, "was

that said provision for the payment of alimony is part of the decree

of the court, and that defendant is now, and has been required to pay,

of paying and failing to pay said alimony in cash weekly and has been and

is now in default of said decree, and that defendant is now in default

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that defendant is now in default of said decree, and that defendant is

It is further ordered that "defendant's petition to modify the decree herein be set for hearing on October 5, 1931, at which time defendant may complete his evidence."

The certificate of evidence discloses that under the order defendant was committed to jail on September 28, 1931, and that he there remained until October 5, 1931, when, by the court's order, he was brought before the court and allowed to give further testimony, for the purpose of "completing his record," as to his inability to make the payments as required. At the conclusion of the hearing the court stated in part:

"In entering the order of commitment the court had in mind the decision in Mengen v. Mengen, 371 Ill. 373, at page 284. * * The court feels from the entire record that this man was disinclined to go ahead with the order of the court. * * I can't get anywhere with this man. He testified today as to the changes that have previously been before the court, and the court will sentence defendant to the county jail for such part of the balance and will give him credit for what he has served. * * Mr. Walker, I'll say this to you; that if you make any reasonable effort to pay a substantial part of the order that has become due, you can get your release, but I want some active effort on your part, - to at least show some interest to the child that is under age, so that it will have its opportunity and place in society. The order will be six months in the county jail, - five months and three weeks; the present commitment to stand, giving credit for one week that he has served."

It further appears that defendant then perfected his appeal from the order of commitment, that he gave a bond for \$1,000, and that he was released from custody pending the disposition of the present appeal; and that on the same day (October 5, 1931) the court entered a further order, in which, after stating the various rules previously entered and defendant's answers thereto, it was ordered:

That the answer and supplemental answer of defendant to the rule to show cause issued against him on November 7, 1930, may stand as supplemental answers to the later rule to show cause issued on September 11, 1931, while said former rule was still pending and undisposed of, and that all evidence taken under said rule of November 7, 1930, shall be considered and treated as part of defendant's evidence; * * that the order of commitment entered on September 28, 1931, be confirmed, excepting that the amount of the appeal bond be reduced to \$1,000, etc.; that the certificate of evidence to be presented shall cover all hearings upon the rules to show cause, and shall be presented to the court within 60 days; and that defendant's petition to reduce the children's award be denied.

It is further stated that "between a position as
modify the degree to which he was working on October 2, 1951,
which also indicates that evidence."

The defendant was committed to jail on September 28, 1931, and that in

1. The Board of Directors of the American Telephone and Telegraph Company, Inc. (AT&T) has decided to discontinue the use of the word "race" in its publications and to replace it with the word "ethnicity".

The order of commitment, dated June 10, 1931, and which was returned from custody pending the disposition of the present case, and that on the same day (October 6, 1931) the court entered its order, after stating the various facts previously stated, that the defendant be committed to the custody of the Sheriff of the County of Los Angeles, California, to await removal.

[illegible]

In the original divorce decree, the court's findings were in part as follows:

"That the parties were married on March 13, 1918, and lived together until August 10, 1927; that two children were born of the marriage, - Elaine, now aged 16 years, and Jacqueline, now aged 8 years; that since the separation the children have been in the custody of complainant; and that during the marriage defendant has been guilty of extreme and repeated cruelty towards complainant, etc.

"5. That the parties hereto entered into an agreement on December 26, 1928, covering a settlement of their respective property rights and in lieu of complainant's dower rights, and an alimony adjustment for complainant, which agreement is hereby made a part of this decree."

"6. That the parties have expressly stipulated and agreed that this court shall retain full and complete jurisdiction over the parties and the subject matter hereof for consideration of alimony and support for complainant from defendant at any time in the future, upon defendant's failure, neglect or refusal, for any reason whatsoever, to comply with each and every of the provisions of said agreement for complainant's benefit; that complainant shall have the right and privilege, upon such failure, neglect or refusal * *, to apply to this court for an order for permanent support and maintenance for herself, and for such other relief as to the court may seem necessary and proper, provided that upon the entry of an order for complainant's support and maintenance, the said agreement shall become null and void, and provided, however, that all payments made by defendant to complainant under the agreement shall be retained by her * * ."

In the ordering part of the decree the court decreed that the marriage between the parties be dissolved; that complainant be awarded the custody, control and education of the two minor children, subject to defendant's right to visit them, etc.; that defendant "pay to complainant the sum of \$100 per month for the support and maintenance of the minor children, - the first payment to be made January 15, 1929, and a like payment on the same day of each and every month thereafter, until the further order of the court;" and

"That the court retain jurisdiction over the parties and the subject matter, for the consideration of alimony and support for complainant at any time hereafter, * * and to enter any and all orders for alimony and support or other relief for complainant, as she may be entitled to, upon her application to this court, in the event and upon the failure, neglect or refusal for any cause on defendant's part to comply with each and every provision contained in the agreement made between the parties for complainant's benefit."

The written agreement, mentioned in the decree, is dated December 26, 1928, and is between defendant, as husband, and

In the original divorce decree, the court's findings

were in part as follows:

"That the parties were married on March 12, 1912, and lived together until July 1912 when the children were born at the marriage. - Since, and in 1912, and thereafter, and in 1912, and thereafter, the children have been in the custody of complainant; and that during the marriage defendant has been guilty of extreme and repeated cruelty towards complainant."

"8. That the parties have entered into an agreement on December 10, 1912, covering a settlement of their respective property rights and in lieu of complainant's dower rights, and an assignment of the property, which agreement is hereby made a part of this decree."

"9. That the parties have expressly stipulated and agreed that this court shall retain full and complete jurisdiction over the parties and the subject matter herein for consideration of all matters and requests for enforcement from defendant at any time in the future. Complainant's failure to appear at trial for any reason whatsoever, to comply with each and every of the provisions of said agreement, and complainant's unwillingness to assign to defendant the right and privilege upon such failure, negated as refused to apply to this court for an order for permanent support and maintenance for herself and for each other child as to the same now necessary to support and maintain the said agreement shall become null and void, and complainant shall be entitled to a decree of divorce as to the same. However, that all property shall be retained by her."

In the foregoing part of the decree the court decreed that

the marriage between the parties be dissolved; that complainant be awarded the custody, control and education of the two minor children, subject to defendant's right to visit them, and that defendant pay to complainant the sum of \$100 per month for the support and maintenance of the minor children, - the first payment to be made January 1, 1913, and a like payment on the 1st day of each and every month thereafter, until one hundred and ten dollars of the sum of \$1000 is paid."

"That the court retain jurisdiction over the parties and the subject matter, for the enforcement of all the provisions of the agreement as to the property, and to order any and all orders for all matters and requests for enforcement from defendant at any time in the future, to comply with each and every of the provisions of said agreement, and complainant's unwillingness to assign to defendant the right and privilege upon such failure, negated as refused to apply to this court for an order for permanent support and maintenance for herself and for each other child as to the same now necessary to support and maintain the said agreement shall become null and void, and complainant shall be entitled to a decree of divorce as to the same. However, that all property shall be retained by her."

The entire agreement, mentioned in the decree, is as follows:

December 10, 1912, and in presence of defendant, as husband, and

complainant, as wife. After stating that the parties are living separate and apart, that the wife has heretofore filed her bill for divorce against the husband, which bill is still pending, and that "the parties desire to make a complete settlement of their respective property rights and all claims and demands of the wife for alimony and support for herself," it is agreed in part:

1. That the husband (defendant) agrees to pay to his wife (complainant) the sum of \$18,000, "which, when fully paid, shall be in full payment and complete satisfaction of all her right, title, claim or interest in and to the property of the husband, and in complete satisfaction of all her claims and demands for alimony and support for herself from said husband, - the said sum to be paid as follows: \$1,000 on or before 6 months from the date of this agreement, and a like sum of \$1,000 to be paid every 6 months thereafter until said sum of \$18,000 is fully paid."

7. That the wife shall have the custody of the two minor children, and the husband shall pay to the wife \$100 per month for their support, "subject to any and all orders or decrees of the circuit court reducing or increasing the said amount."

9. That if a decree of divorce is granted to the wife in her pending action for divorce, the decree "shall provide that the court shall retain jurisdiction to enter all orders for alimony and support of the wife, but only in the event that the husband fails, neglects or refuses, for any reason, to comply with this agreement; and that in the event the husband fails, neglects or refuses to make the payments required under this agreement, or to comply with its provisions, then any sums paid to the wife thereunder shall be considered as alimony for her support and maintenance during such time as these payments were made," it being the intention of the parties that the wife shall not waive her rights in and to the property of defendant or her claims and demands for alimony for herself from defendant until and upon the full payments of all of the amounts under this agreement; and that in the event of a breach of any of the provisions (time of making payments being of the essence), "the wife shall have the election: (a) of enforcing the provisions of this agreement at law or in equity; (b) or, in the alternative, of making application to the court, wherein said divorce decree was entered, for permanent alimony and support for herself;" but in the event the wife elects the latter alternative of making application to the divorce court for permanent alimony for herself, the entry of such an order for permanent alimony "shall act as a complete nullification and avoiding of this alimony agreement."

It is first contended by defendant's counsel that the court had "no jurisdiction" to enforce by contempt proceedings the provisions of the settlement agreement of December 26, 1928, as to the payment to complainant of said sum of \$18,000, in installments of \$1,000 every six months after the date of the agreement. And the argument

complaint, no wife. After stating that the parties are living separate and apart, that the wife has been advised that her bill for divorce against the husband, which will be still pending, and that "the parties desire to make a complete settlement of their respective property rights and all claims and demands of one wife for alimony and support for herself," it is agreed in part:

1. That the husband (defendant) agrees to pay to the wife (complainant) the sum of \$12,000, which shall be paid in full payment and complete satisfaction of all her claims, rights and demands in and to the property of the husband, and in complete satisfaction of all her claims and demands for alimony and support for herself from said husband. - The said sum to be paid as follows: \$1,000 on or before 1 month from the date of this agreement, and a like sum of \$1,000 to be paid every 3 months thereafter until said sum of \$12,000 is fully paid.

2. That the wife shall have the custody of the two children, and the husband shall pay to the wife \$100 per month for their support, "unless to any and all extent or degree of the husband's income is insufficient to maintain the said children."

3. That if a decree of divorce is granted to the wife in any court having jurisdiction, the husband shall retain the right to make all orders for alimony and support of the wife, but only in the event that the husband fails, neglects or refuses, for any reason, to comply with this agreement, and that in the event the husband fails, neglects or refuses to make the payments required under this agreement, he is to comply with the provisions, when any sum paid to the wife hereunder shall be considered as alimony for her support and maintenance during such time as there remains any sum of money in and to the parties that the wife shall not waive her rights in and to the property of either of her claims and demands for alimony and support from defendant until and upon the full payment of all of the sum of \$12,000, and that in the event of a decree of divorce, the wife shall have the custody of the two children (as of the date of this agreement) as if no divorce had been granted. (b) In the alternative, or making application to the court, wherein said divorce is entered, for permanent alimony and support for herself, and in the event the wife elects the latter alternative of making application to the divorce court for permanent alimony for herself, the wife shall be entitled to the sum of \$12,000, which shall be paid as follows: \$1,000 on or before 1 month from the date of this agreement, and a like sum of \$1,000 to be paid every 3 months thereafter until said sum of \$12,000 is fully paid.

It is further covenanted by defendant's counsel that the court shall have jurisdiction to enforce by contempt proceedings the provisions of the settlement agreement of December 22, 1933, as to the payment of the settlement of said sum of \$12,000, in installments of \$1,000 per month after the date of this agreement, and the court

is, as we understand it, that, because there is no order in the ordering part of the divorce decree directing defendant to pay said sum of \$18,000 in the mentioned installments, the decree does not afford any basis for the entry of the commitment order appealed from. We cannot agree with the contention or argument. When the divorce decree was entered the court had jurisdiction of the parties and the subject matter. By the agreement of the parties of December 26, 1928, defendant, in complete satisfaction of all of complainant's claims for alimony, etc., agreed to pay the sum of \$18,000 in said installments; and in paragraph 5 of the decree the court finds that said agreement "is hereby made a part of the decree;" and in the ordering part of the decree it is provided that the court shall "retain jurisdiction" over the parties and the subject matter "for the consideration of alimony and support for complainant at any time hereafter." Furthermore in said agreement (made a part of the decree) it is provided that, if complainant obtains a divorce decree in her then pending action therefor, the decree "shall provide that the court shall retain jurisdiction to enter all orders for alimony and support of the wife, but only in the event that the husband fails, neglects or refuses for any reason to comply with this agreement," etc. We think it clear from the entire decree, and the agreement made a part thereof, that the circuit court had power and authority to enforce by appropriate proceedings the payment of said sum of \$18,000, in the mentioned installments, for complainant's alimony and support. The adopting by the court of the agreement as a part of the decree amounted in effect to an order by the court that said sum should be paid by defendant in the installments mentioned. And defendant, in our opinion, cannot now be heard to urge the instant contention.

It is also contended that the commitment order appealed

as we understand it, that, because there is no order in the
testimony of the divorcee as to the date of the divorce, the divorce does not
exist any more for the purpose of the commission even if it
does. We cannot agree with the contention of argument. Then the
testimony of the divorcee is not sufficient to establish the divorce at the time
of the subject matter. By the agreement of the parties of January
1, 1902, defendant, in complete satisfaction of all of complainant's
claims for alimony, etc., agreed to pay the sum of \$10,000 in cash
immediately; and in paragraph 5 of the decree the court finds that
the agreement "is hereby made a part of the decree;" and in the
ordering part of the decree it is provided that the court shall "retain
jurisdiction" over the parties and the subject matter "for the purpose
of allowing and support for complainant at any time here-
after." Paragraph 6 of the agreement (made a part of the decree) is
as follows: "It is further provided that the divorce shall be
made absolute; therefore, the divorce shall provide that the court
shall retain jurisdiction to order all orders for alimony and support
the wife, but only in the event that the husband fails, neglects
refuses for any reason to comply with this agreement," etc. No
doubt is there from the entire context, and the agreement made a part
of the decree, that the divorce court had power and authority to order by
paragraph 6 of the agreement the payment of said sum of \$10,000, in the
mentioned installment, for complainant's alimony and support. The
agreement by the court of the agreement as a part of the decree amounting
to an order by the court that said sum should be paid by
defendant in the installments mentioned. As defendant, in his
pleading, cannot now be heard to urge the instant contention,
it is also contended that the husband's order against

from should be reversed because defendant, by his testimony and his written evidence, "made a clear showing of his inability to live up to the settlement agreement," and that "there was no willful or contumacious refusal on his part to obey the court's order."

The original order on defendant to show cause why he should not be committed for contempt for failure to pay accrued alimony (\$4500) to complainant was entered on November 7, 1930. He filed an answer to the rule, and on March 8, 1931, he filed a lengthy supplemental answer, to which was attached as a part thereof an itemized account of his income and expenses for the years 1929 and 1930, and of his assets and liabilities "as of October 18, 1930, revised as of March 4, 1931." For the year 1929 the income stated is \$36,470.04 and the expenses \$36,461.76. For that portion of the year 1930, up to November 1, 1930, the income stated is \$5,668.21 and the expenses \$5,674.03. For the months of November and December, 1930, the income stated is \$2363.84 and the expenses \$2223.28. And his assets and liabilities, as set forth, disclose a stated "net worth of \$7,063.49." A hearing was had on the rule during July, 1931, and up to the time of that hearing defendant, apparently, made no attempts to make any payments whatsoever on account of the past due alimony. His attitude rather was that he could not be compelled to pay by the pending contempt proceedings. On July 13, 1931, the court (Judge Trade) entered an order that the hearing "be continued to October 2, 1931, - the court at that time to investigate the financial condition of defendant and determine whether or not he during the interim has in good faith attempted to comply with said decree and agreement." In the preamble of the order it is stated that the cause came on to be heard upon complainant's petition and upon the answers of defendant "denying the

court's right to proceed by rule to show cause, and setting forth that the agreement is not a part of the decree and not enforceable by contempt action, and further alleging his inability to comply with the agreement;" that testimony was heard and arguments had by opposing counsel "on the proposition as to whether the court could enforce the decree and agreement by contempt;" and in the order the court found:

"That the agreement entered into between the parties and under which defendant undertook to pay to complainant the sum of \$13,000 in installments, was made a part of the decree for divorce entered on January 2, 1929; that it being a part of the decree its terms and provisions are a part of said decree; and that this court has the power and authority to enforce said provisions of said agreement by way of rule to show cause and contempt, or in any other manner that the statutes provide for enforcement of decrees for divorce in chancery. And the court further finds from the evidence that defendant merits additional time in which to comply with said agreement and decree."

It further appears that after said July hearing, defendant ceased making the monthly payments of \$100 for the support of his two children, as provided in the agreement and in the divorce decree. And, during the ^{court} vacation, on September 11, 1931, complainant, before another Judge (Judge Normoyle), filed another petition for a rule to show cause, etc., and on that day the court entered another rule on defendant to show cause by September 16, 1931, why he should not be punished for contempt because "of his failure to pay to complainant the sum of \$200, due for the support of the minor children of the parties, and the sum of \$5500 due to her as alimony." On September 13, 1931, defendant filed an answer and a cross-petition. In the answer he alleged that by the divorce decree it was provided that he should pay to complainant \$100 per month for the support of the children; that he made payments thereunder up to the month of December, 1930; that on December 2, 1930, the elder child (Elaine) "became of legal age;" that notwithstanding that fact defendant thereafter and until July, 1931, inclusive (being a period of 8

...rights to proceed by suit to show cause, and setting forth
that the agreement is not a part of the divorce and not enforceable
...the agreement? That defendant was bound and obligated to comply
...on the proposition as to whether the court
...in the

under the court found:

"That the agreement entered into between the parties and
which defendant undertakes to pay to plaintiff the sum of
\$1,500 in installments, was made a part of the divorce for divorce
...in January, 1931; that it being a part of the divorce the
court and plaintiff are a part of said decree; and that this court
as the power and authority to enforce said provisions of said
agreement by way of this is now shown and defendant, in its own
pleading, has admitted its obligation to comply with said
agreement and decree."

It further appears that after said July hearing, defendant
ceased making the monthly payments of \$100 for the support of his two
children, as provided in the agreement and in the divorce decree.
...count
...on September 12, 1931, complaint, return
...other judge (Judge Norwalk), filed another petition for a wife to
...and so that the court entered another order on
...to show cause by September 12, 1931, why he should not be
...of his failure to pay to complainant
...of the sum of \$200, due for the support of the minor children of the
...the sum of \$200 and he was as a result, ...
...in the
...the divorce decree it was provided that
...the support of the
...the month of
...the other child (Katherine)
...that defendant had not complied

months) continued to make payments of \$100 per month; that by reason thereof he has paid "\$400 in excess of the amounts required of him for the support of the children;" that during July, 1931, a hearing was had as to defendant's ability to pay alimony, at which the court "refused to hold defendant in contempt or to punish him, but continued the rule upon which the hearing was had to October, 1931;" that defendant's financial condition and ability to pay has not improved since the July hearing; and that he "has made payment of all funds available which he could possibly realize for the support of the children." In the cross-petition defendant alleged that his sole means of deriving an income is through his real estate brokerage business, in which he has been engaged for about 15 years; that the child, Elaine, became of the legal age of 18 years on December 2, 1930; that the provision of the divorce decree was for the payment of \$100 per month for the support of the children - the other child, Jacqueline, being now of the age of 11 years; that said decree should be so modified as to provide for the payment of \$50 per month for the support of Jacqueline; and that defendant should "be given credit for payments made in excess of \$50 per month beginning with December 15, 1930," etc. It does not appear that any action was taken by the court on said rule of September 11, 1931, until the hearing had before Judge Trude on September 28, 1931, during which hearing the court acted on both rules and entered the commitment order appealed from, as first above mentioned. In that order the court found that defendant "has been in receipt of an income sufficient to have enabled him to have paid to complainant, and to now pay, the sum of \$175 for the support of the children, and the sum of \$5,000 due to complainant for her alimony," but that he, "in willful contempt of this court," has "refused and willfully neglected" to pay said sums. In the order of October 5, 1931, after the court had heard further

testimony of defendant as to his claimed inability to make any further payments, either for complainant's alimony or for the support of the children, the court confirmed said commitment order of September 28, 1931.

After a careful consideration of defendant's evidence, including his testimony given on October 5, 1931, and of all the facts and circumstances in evidence, we are unable to say that the court was not warranted in entering the commitment order appealed from, and, after having heard defendant's further testimony, in refusing on October 5, 1931, to modify the same except in the particulars stated. And we do not think we would be justified in reversing the order on the ground of defendant's total inability, as here urged, to make any payments either for past due alimony to complainant or for the children's support. Upon the hearing of October 5, 1931, the court stated to defendant that "if you make any reasonable effort to pay a substantial part of the order that has become due, you can get your release." Defendant, however, apparently preferred not to make that reasonable effort, but to pray and perfect the present appeal. And we think that what was said in Shaffner v. Shaffner, 212 Ill. 492 (a case cited in Hengen v. Hengen, 271 id. 278, 284) at page 496, is peculiarly applicable to the facts as presented in the present transcript: "He who seeks to establish the fact that his failure to pay is the result of lack of funds must show with reasonable certainty the amount of money he has received. He must then show that that money has been disbursed in paying obligations and expenses which, under the law, he should pay before he makes any payment on the decree for alimony. It is proper that he first pay his bare living expenses; but whenever he has any money in his possession that belongs to him and which is not absolutely needed by him for the purpose of obtaining the mere

testimony of defendant as to his claimed inability to make any
further payments, either for defendant's attorney or for the
payment of the children, the court sustained said commitment order.

After a careful consideration of defendant's evidence,
including his testimony given on October 5, 1931, and of all the
facts and circumstances in evidence, we are unable to say that the
court was not warranted in issuing the commitment order appealed
from, and, after having heard defendant's further testimony, is

affirmed on October 5, 1931, as modifying the same except in the
following respects. And we do not think we would be justified in
overruling the order on the ground of defendant's total inability
to make payments, as we have not heard the testimony of the
defendant as to his ability to pay. Upon the hearing of

October 5, 1931, the court stated to defendant that "if you make
no reasonable effort to pay a substantial part of the order then
we become two, you and your wife." Defendant, however,
persistently refused not to make that reasonable effort, but to keep
up the present expense, and we think that what was said in

Winters v. Winters, 213 Ill. 400 (a case cited in Winters v. Winters)
is applicable to the facts of this case. The wife was to contribute
to the maintenance of the children to the extent of her ability
to do so, and the husband was to contribute to the maintenance of the children

to the extent of his ability to do so. The court in this case
should have made any payment on the order for alimony. It is
not for the court to make any payment on the order for alimony. It is
not for the court to make any payment on the order for alimony. It is

not for the court to make any payment on the order for alimony. It is

necessaries of life, it is his duty to make a payment on this decree. We are not satisfied from his answer, affidavits and testimony that he has pursued this course."

It is also contended that as by the order of July 13, 1931, the further hearing on the rule to show cause was continued to October 2, 1931, the court erred in entering the commitment order on September 28, 1931. There is no substantial merit in the contention. The commitment order of September 28, 1931, was based upon a new position, (to which defendant filed an answer) showing not only that defendant was in arrears for alimony payments to complainant but also in payments due for the support of the two children. Furthermore, the court allowed defendant to give further testimony on October 5, 1931, when the confirmatory order was entered.

It is also contended that a proper credit of \$400 was not allowed to defendant, because of his claimed over-payments on the support money for the children. The argument is that this credit should have been allowed because the elder child, Elaine, became of legal age on December 2, 1930, after which date he was only obligated to pay \$50 per month for the support of the younger child, Jacqueline. We find no merit in this contention because (a) from his answer (filed September 18, 1931) to the new rule to show cause, it appears that he continued to pay the monthly support money for both children until July, 1931, though he knew the elder child had reached her majority; and (b) by the agreement of December 26, 1928, he undertook to pay to complainant \$100 per month for the support of both children "subject to any and all orders or decrees of the circuit court reducing or increasing the said amount," and by the decree this \$100 monthly payment was to be continued "until the further order of the court." Nothing is said in either the

...of life, it is his duty to make a payment on this
...not withdrawn from his money, activities and
...that he has received this money."

It is also contended that on the order of July 12, 1931,
...further hearing on the rule to show cause was continued to October
1931. The court acted in ordering the commitment order on September
1931. There is no substantiated merit in the contention. The
commitment order of September 22, 1931, was based upon a new petition,
in which defendant filed an answer, showing not only that defendant
is in arrears for alimony payments to complainant but also in pay-
ments for the support of the two children. Furthermore, the
court allowed defendant to give further testimony on October 2, 1931,
and the commitment order was entered.

It is also contended that a proper credit of \$100 was
allowed to defendant, because of his claimed over-payment on
the support money for the children. The argument is that this
will enable him to pay the balance of the child's tuition,
amount of legal fees on December 2, 1930, after which date he was
obligated to pay \$50 per month for the support of the younger
child, Jacqueline. He filed no motion in this contention because (a)
in his answer (filed September 12, 1931) to the new rule to show
cause, it appears that he continues to pay the monthly support money
a debt entitled until July 1931, though he says the other child
is retained her majority; and (b) by the agreement of December 22,
1931, he undertook to pay to complainant \$100 per month for the
support of both children "subject to any and all orders or decrees
the court may make retaining or increasing the said amount," and
the decree that \$100 monthly payment was to be continued "until
a further order of the court." Nothing is said in either the

agreement or the decree as to a reduction in the payment of said amount upon the elder child reaching her majority.

Our conclusion is that the commitment order appealed from should be and it is affirmed.

AFFIRMED.

Kerner, P. J., and Scanlan, J., concur.

statement of the facts as to a violation in the payment of said
amount upon the 15th day of October last.

Our committee is that the committee which reported

you should be and is its attorney.

Yours truly,

Wm. L. L. and Joseph L. L. L.

35682

ALBERT VOJVARKA,
Plaintiff in Error,

v.

SIDNEY H. GETTELMAN,
Defendant in Error.

597
WRIT TO CIRCUIT COURT,
COOK COUNTY.

267 I.A. 610

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 10, 1931, the cause coming on to be heard upon defendant's general and special demurrer to plaintiff's second amended declaration (consisting of one original count and five additional counts), the court ordered that the demurrer be sustained to all counts, and, plaintiff electing to stand by his declaration, entered judgment against him for costs. By this writ of error plaintiff seeks to reverse the judgment.

The action is trespass on the case for fraud and deceit and was commenced on December 2, 1930. About the same time, upon affidavit and bond filed by plaintiff, the court ordered that a capias ad respondendum issue against defendant, who subsequently filed a bail bond and was released. When the judgment against plaintiff was entered on July 10, 1931, as aforesaid, the court on the same day ordered that plaintiff's affidavit, filed in support of the issuance of the capias, "be stricken from the files for insufficiency, that defendant be discharged from arrest, and that the bail for defendant be discharged."

In the original count of plaintiff's second amended declaration, filed June 18, 1931, he averred in substance that on December 3, 1925, he bargained with defendant to buy of him 5100 shares of the common stock of the Car Lighting & Power Co., which stock defendant then "represented he was able to sell and deliver

ALBERT VOUTAS,
Plaintiff in Error,
v.
JIMMY H. CRITCHFIELD,
Defendant in Error.

WAS TO BE HEARD BY THE COURT.

AND HEARD.

8871A. 610

MR. JUSTICE BRIDGES DELIVERED THE OPINION OF THE COURT.

On July 10, 1931, the cause coming on to be heard upon

defendant's general and special demurrer to plaintiff's second

amended declaration (consisting of one original count and five

additional counts), the court ordered that the demurrer be sustained

on all counts, and, plaintiff electing to stand by his declaration,

entered judgment against him for costs. By this writ of error

plaintiff seeks to reverse the judgment.

The action is brought on the case for fraud and deceit

and was commenced on December 2, 1930. About the same time, upon

plaintiff's motion filed by plaintiff, the court ordered that a

series of interrogatories issue against defendant, who subsequently

filed a bill of particulars and was dismissed. Then the judgment against

plaintiff was entered on July 10, 1931, as above said, the court

on the same day ordered that plaintiff's bill of particulars be

removed to the records of the court, the parties from the time

the interrogatories, that defendant be discharged from costs, and

that the bill for defendant be discharged.

In the original count of plaintiff's second amended

declaration, filed June 10, 1931, he averred in substance that on

December 2, 1928, he bargained with defendant to buy of him 2100

shares of the common stock of the Gas Lighting & Power Co., which

for the price of \$9562.35, as an agent or officer of a corporation known as McCabe & Co., then engaged in the business of buying and selling shares of stock in corporations;" that defendant, for the purpose of inducing plaintiff to purchase said stock, also then "falsely and fraudulently represented to plaintiff that said McCabe & Co. was a corporation, engaged in the buying and selling of shares of stock in corporations and having a seat or membership on the Chicago Stock Exchange, and by reason thereof trustworthy and entitled to the confidence of plaintiff, and that McCabe & Co. was a corporation whose officers and agents had great experience in the buying and selling of shares of stock in corporations, and that McCabe & Co. had a capital stock of one million dollars and by reason thereof capable of executing and fully performing any agreements by it made, and that McCabe & Co. sold only such shares of stock as it had first acquired and become possessed of;" that plaintiff, relying upon said representations, then purchased, and defendant then "deceitfully sold to plaintiff," the shares of stock for the sum of \$9562.35, "which sum plaintiff then paid to defendant;" that in fact said McCabe & Co. did not then own or possess the shares of stock, did not have any title or interest in the same, was not able to deliver the same, was not capable of executing or performing any agreements by it made, did not sell only such shares of stock as it had previously acquired, did not then have a seat or membership on the Chicago Stock Exchange, and was never in fact ready, willing or able to deliver the 5100 shares of stock, all of which defendant well knew; and that, therefore, defendant falsely deceived and defrauded plaintiff, to his damage in the sum of \$10,000.

To this count defendant, on June 23, 1931, filed a general and special demurrer, and for cause of demurrer stated:

...the price of \$982.50, as an agent or officer of a corporation
...as McCabe & Co., then engaged in the business of buying and
...ing shares of stock in corporations; that defendant, for the
...of inducing plaintiff to purchase said stock, also then
...and fraudulently represented to plaintiff that said McCabe
...was a corporation, engaged in the buying and selling of shares
...stock in corporations and having a seat or membership on the
...large stock exchange, and by reason thereof standing ready and willing
...the purchase of plaintiff's stock, and that McCabe & Co., was a corporation
...more officers and agents had great experience in the buying and
...ing of shares of stock in corporations, and that McCabe & Co. had
...capital stock of one million dollars and by reason thereof capable
...extending and fully guaranteeing any agreement by its make, and that
...McCabe & Co. sold only such shares of stock as it had first acquired
...and become possessed of; that plaintiff, relying upon said
...representations, then purchased and acquired from defendant
...to plaintiff, the shares of stock for the sum of \$982.50,
...which said plaintiff then paid to defendant; that in fact said
...McCabe & Co. did not then own or possess the shares of stock, did
...have any title or interest in the same, was not able to deliver
...the same, was not capable of guaranteeing or performing any agreement
...it made, did not sell only such shares of stock as it had first
...acquired; did not then have a seat or membership on the
...large stock exchange, and was never in fact ready, willing or
...to deliver the shares of stock, all of which defendant
...did know and that defendant fraudulently deceived and
...tricked plaintiff to his damage in the sum of \$10,000.
To this count defendant, on June 20, 1901, filed a motion
for special verdict, and the court at that time refused

"That the various promises and representations, if any, contained in said second amended declaration, would constitute a cause of action, if any, in assumpsit and not for trespass on the case, and therefore the declaration is bad for inconsistency and departure, in that in the praecipe and writ plaintiff charged an action of trespass on the case, whereas by virtue of the allegations in said declaration plaintiff represents an action ex contractu," etc.

On June 25, 1931, by leave of court, plaintiff filed five additional counts, and on defendant's motion it was ordered that his demurrer to the original count stand as such to each additional count. In each of the additional counts the stated fraudulent representations, alleged to have been made by defendant to induce plaintiff to agree to purchase the 5100 shares of stock for said sum, are substantially the same as in the original count, and there are similar allegations that plaintiff relied upon the representations and because of them paid to defendant said sum of money for the shares, which McCabe & Co. never were in fact ready, able and willing to deliver to plaintiff. In the third additional (or fourth) count plaintiff further alleged that McCabe & Co. "did not in fact own or have possession of said shares of stock * * and did not in fact intend to deliver the same and have never delivered the same, notwithstanding that this plaintiff paid to defendant said sum of \$9562.85, * * all of which defendant then and there well knew, and so defendant falsely deceived and defrauded plaintiff," etc. Similar allegations are contained in the fourth additional (or fifth) count.

After carefully considering the allegations of the declaration we are of the opinion that the court erred in the ruling complained of. We think that as against the general and special demurrer the declaration sufficiently disclosed such a cause of action in case for fraud and deceit as required that defendant plead thereto and that a trial upon the merits be had. In Johnston v. Shockey, 335 Ill. 363, 366, it is said: "An action for fraud and deceit must show six elements in order to afford relief: (1) The

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with Basil Williams, June 10, 1945. He sent no

Additional counts, and on defendant's motion it was ordered that his answer to the original count be used as such additional count. A copy of the additional count the state forwarding representative alleged to have been made by defendant to induce plaintiff to agree to purchase the 500 shares of stock for said sum, was substantially the same as in the original count, and there are similar allegations that plaintiff relied upon the representations and promises of that kind to induce him to agree to purchase the 500 shares of stock for said sum.

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After carefully examining the allegations of the
petitioner we are of the opinion that the court erred in the
first complaint of. We think that as against the Government and
not against the petitioner the decision was manifestly incorrect and a new
action is due for funds and debts as against these defendants
and therefore that a writ upon the writs be had. In Johnson
and Johnson 358 U.S. 358, 360, it is held: "An action for funds and

misrepresentation must be in form a statement of fact; (2) it must be made for the purpose of influencing the other party to act; (3) it must be untrue; (4) the party making the statement must know or believe it to be untrue; (5) the person to whom it is made must believe and rely on the statement; and (6) the statement must be material." We think that all these elements are sufficiently charged and disclosed in the declaration. Defendant's counsel here contend that defendant's alleged false representations that he was an agent or officer of McCabe & Co., that that corporation bought and sold shares of stock, that it had great experience in that business, that it was capitalized for one million dollars, that it owned and possessed the particular shares of stock and would sell them to plaintiff, and that it only sold such stock as it had originally purchased, - "are all matters collateral to the contract, merely affecting the probability of performance, and are not of such material nature as to constitute a basis for recovery in an action of fraud and deceit." We cannot agree with the contention. We think that it sufficiently appears from the declaration that these representations were such as engendered plaintiff's confidence in defendant and the corporation of McCabe & Co. and induced plaintiff to part with his money for the shares of stock, which he did not thereafter receive, as alleged. Nor do we think that there is any substantial merit in defendant's counsel's further contention that the declaration only charges a breach of a promise to do something in the future (i.e. to deliver to plaintiff the shares of stock), which, while stating a good cause of action in assumpsit, is no proper basis for a recovery in an action of fraud and deceit. The allegations sufficiently disclose a case where plaintiff parted with his money, because of defendant's false representations and in expectation of immediately receiving the stock purchased, which stock neither defendant nor

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McCabe & Co. could deliver and which plaintiff never received, to his damage in the amount of money he paid to defendant, as alleged.

The judgment of July 10, 1931, is reversed, and the cause is remanded with directions to the circuit court to overrule defendant's demurrer to said second amended declaration and give defendant an opportunity to plead, etc.

REVERSED AND REMANDED WITH DIRECTIONS.

Kerner, F. J., and Seanlan, J., concur.

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GUY PAYNE,
Plaintiff in Error,

v.

EVENING AMERICAN PUBLISHING
CO., a corporation,
Defendant in Error.

607
ERROR TO SUPERIOR COURT,
COOK COUNTY.

267 I.A. 610

MR. JUSTICE CHIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in case for an alleged libel the court, on October 24, 1931, sustained defendant's demurrer to plaintiff's declaration and, plaintiff electing to stand by the declaration, entered a judgment of nisi capiat against him. By this writ of error he seeks to reverse the judgment.

The action was commenced on April 9, 1931. In the declaration, consisting of one count, plaintiff alleged his good name, credit and reputation in the State at and before the time of the publication in question, defendant's knowledge thereof, and the publication by it in Cook County, Illinois, on September 25, 1930, in the "Chicago Evening American" (a newspaper owned and edited by defendant), and with the malicious intent of injuring and disgracing plaintiff, of a false and malicious libel, containing false, scandalous and defamatory matters of and concerning plaintiff, as follows:

"2 SOUGHT IN RACKET PLOT

Two ex-convicts were sought by police today and four other men, including the secretary of a number of North Side neighborhood business associations, faced grand jury appearances in connection with an alleged racketeering attempt to organize beauty shop owners.

Exposure of the alleged racket, which prosecutors charge aimed at extorting something like \$300,000 annually from the owners of such establishments, was pronounced the most effective blow struck yet in the grand jury investigation of gangster interference with honest businesses and labor unions.

USE 6 BOMBS IN PLANS.

The organization of the beauty shops was attended by the

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3641A. 610

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CONFIDENTIAL - SECURITY INFORMATION

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On October 24, 1961, mentioned defendant's daughter, as identified, testified that defendant's statement to him of the defendant's intention to commit a "judgment of his racial" against him. By this with of

The edition was published in 1985.

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2622 MORGAN ET AL.

Two ex-convicts were working by police today and four other men, including the secretary of a branch of Moral Re-Armament, business associations, and grand jury members, in connection with an alleged racketeering attempt to organize a union ship owners.

Exposure of the alleged worker, which provided the
aimed at exposing something like \$200,000 annually from the
course of such settlements, and presumably the most effective
also given yet in the great but investigation of managers
relationship with these businesses and labor unions.

OWEN, H. J. 1960. p. 100.

The organization of the health shops was attended by the

explosion of six bombs in front of the shops of recalcitrant operators several weeks ago. The fact that the two ex-convicts, sought for their connection with the ring, both went to prison for bombing outrages was considered significant.

The men sought are Peter ('Dynamite Peter') Cunniff, described as the chief terrorist of the outfit, who went to prison in 1916 for a dynamite plot in connection with a labor dispute, and Ray H. Williams,

(Continued on Page 2, Column 1.

2.

POLICE SEEK TWO EX-CONVICTS IN
BEAUTY SHOP RACKET PLOT
4 PAGE JURY INQUIRY

Continued from First Page

convicted ten years ago of bombings while he was secretary of a barbers' organization. Both since have been active as labor racketeers, police say.

Four other men, Frank and James Cunniff of 3215 W. Polk St., said to be brothers of Peter, Jerry Nape, 3610 Pine Grove Av., and Guy Payne, 4010 N. Lincoln St., were arrested during the night by Sergt. Ray Gilse and his detective squad and held at the Lawndale police station for questioning in the inquiry. (Italics ours.)

The arresting officers did not disclose their prisoners' exact connections with the ring. (Italics ours.)

Emery T. Erickson, 622 Diversey parkway, who is secretary of several neighborhood business men's groups, was one of those taken to the state's attorney's office last night and quizzed about the union. The others grilled were J. M. Baran, 2129 Cleveland av., 'sales manager' of the alleged racket; Frank W. Crawley, 3311 Washington blvd., and James L. Howard, an ex-convict, of 3156 Clybourn av.

BARED THROUGH ARRESTS.

The men behind the attempt to organize the beauty shops were unmasked by the arrest yesterday of Crawley and Howard. They called on T. M. Piotrowski, owner of a beauty shop at 1140 Milwaukee av., displaying a letter from Erickson as executive secretary of the 'Master Beauty Shop Owners' Association.'

Howard sought to enrol Piotrowski as a member of the association, which has an initiation fee of \$10 and \$2 a month dues. Crawley wanted to organize the employees in the shop as members of a union, alleged to be a subsidiary racket of the group.

Piotrowski told the men to return. Then he notified police. The two were seized when they reappeared at the shop.

Erickson, in addition to his connection with the beauty shop ring, is secretary of the Midtown Business Men's Association, the Central North Town Association, the Central Lake View Association of Commerce, the Rogers Park-Clark Street Business Association and several other similar organizations."

(meaning thereby to allege that plaintiff was engaged in a conspiracy with others to extort money from said Piotrowski by threats to destroy his property by bombing, and also meaning thereby that plaintiff was engaged in an attempt to extort money from said Piotrowski by threats to destroy his property by bombing, and also meaning thereby

1. The first step in the process of identifying a problem is to determine the scope of the problem. This involves identifying the specific area of concern and the individuals or groups affected by the problem.

(Continued on Page 2, Column 1.)

CONFIDENTIAL

WE STAYED IN THE HOTEL
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containing the names of the persons who are members of the
the "National Association of Manufacturers" and the "National
Association of Manufacturers" and the "National Association of
Manufacturers" and the "National Association of Manufacturers".

the Miami Police Station for questioning in the morning.

The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and is being furnished to you for your information.

On 11/11/1964, the following information was received from the Bureau of the Census, Washington, D.C.:

MAKES WHITE CREAM

The men behind the attempt to organize the heavily negro wards
of the inner city of New York and Boston. They called
on J. M. Holloman, head of a small shop at 1100 Broadway N.Y.,
for a letter from Ericsson an executive secretary of the
"The Young Men's Association".

Graham wanted to organize the employees in the shop as
union, claiming it was a monopoly racket of the

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed changes to the law of the United Kingdom in relation to the treatment of the British Commonwealth of Nations.

that plaintiff was engaged in a conspiracy with others to wilfully and maliciously destroy, damage, injure or deface a building used or designed for human occupancy, by means of a bomb, and also meaning thereby that plaintiff was engaged in wilfully and maliciously destroying, damaging, injuring or defacing a building used or designed for human occupancy, by means of a bomb, or was attempting so to do, or was aiding, abetting, assisting, advising and encouraging the perpetration of such wilful and malicious act, and also meaning thereby that plaintiff was an associate of ex-convicts, and also meaning that plaintiff had engaged in an attempt to extort money from various persons by threats to destroy their property by bombing, and also meaning thereby that plaintiff had wilfully and maliciously destroyed, damaged, injured or defaced a building or buildings used or designed for human occupancy, by means of a bomb, or had attempted so to do, or had aided, abetted, assisted, advised or encouraged the perpetration of such wilful and malicious act.)

And the declaration further alleged that, by means of the committing of said grievances by defendant, plaintiff has been and is greatly injured in his good name, credit and reputation, etc., and has been and is exposed to public hatred, aversion and disgrace, and an evil opinion of him has been and is induced in the minds of right thinking persons, etc., and he has been and is shunned and avoided by diverse persons, and he has been and is otherwise injured; to his damage in the sum of \$25,000, etc.

To the declaration defendant filed a general and special demurrer, in which it stated as grounds for demurrer, among others, (1) that "no one of the innuendoes in the declaration is reasonably ascribable to the alleged libelous words;" and (2) that "the alleged libelous words are not capable of conveying the meaning ascribed to them by the innuendoes."

In urging that the judgment should be reversed counsel for plaintiff here contend that the court erred in sustaining defendant's demurrer to plaintiff's declaration because (1) "the article published is reasonably capable of being understood as having the libelous meaning ascribed to it in the innuendoes;" and (2) the question whether it did have such libelous meaning or was so understood by the readers thereof was one of fact for a

jury, and not for the court, to determine. We cannot agree with these contentions. In Hays v. Mather, 15 Ill. App. 30, 32, it is said:

"Then the words of an alleged libelous publication are not reasonably susceptible of any defamatory meaning, the court is justified in sustaining a demurrer to the declaration. But if they are reasonably susceptible of two constructions, the one innocent and the other a libelous construction, then it is a question for the jury which construction is the proper one; and in such case if the defendant demurs to the declaration, his demurrer will be overruled. * * A rule involving substantially the same idea has been concisely stated thus: It is for the court to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to decide whether such meaning is truly ascribed." (See, also, Macdonald v. Lord, 27 Ill. App. 111, 114; Gerald v. Inter Ocean Publishing Co., 90 Ill. App. 205, 210; Clarkson v. Book Supply Co., 170 Ill. App. 86, 88; LaGrange Press v. Citizen Publishing Co., 252 Ill. App. 482, 485.)

And it is well settled in the law concerning libel that the purpose of innuendoes is to explain the words in the alleged libel and to give them their proper meaning, but not to enlarge the words or the article beyond their natural meaning. (LaGrange Press v. Citizens Publishing Co., *supra*; Marshall v. Chicago Herald Co., 185 Ill. App. 234, 226; Sullivan v. Illinois Publishing & Printing Co., 136 Ill. App. 268, 270; McLaughlin v. Fisher, 136 Ill. 111, 116.)

In the innuendoes set out in the declaration it is alleged that by the published article it was meant by defendant to state that plaintiff "was engaged in a conspiracy with others to extort money from Piotrowski by threats to destroy his property by bombing," or "to willfully and maliciously destroy or damage a building used or designed for human occupancy by means of a bomb;" or that plaintiff was aiding, abetting or encouraging the perpetration of such a willful and malicious act; and that plaintiff "was an associate of ex-convicts;" and that plaintiff "had engaged in an attempt to extort money from various persons by threats to destroy their property by bombing;" and that plaintiff "had willfully and maliciously destroyed or damaged a building or buildings used or designed for human occupancy

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• 1992

1. The first of the three is the "General" which is a very general statement of the facts of the case. It is a statement of the facts of the case as they appear to the writer. It is a statement of the facts of the case as they appear to the writer. It is a statement of the facts of the case as they appear to the writer.

And it is well known that the American people are not in a position to afford the luxury of a large, expensive, and elaborate funeral.

a number of individuals in the study

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in the literature we see in the health care industry is a

This work is subject to review by the National Security Council and the Department of Defense.

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to "provide a program of research on the effects of the

to have gained a second or third generation and still be

aligned for human occupancy by means of a "baffle" or "diverter" of air.

aiding, abetting or encouraging the perpetration of such a willful

WYOMING TRADES & SERVICE CO. 1120 N. 1ST ST. LARAMIE WY. 82001

See various papers by Shwartz in various other issues of this journal.

that document had willfully and maliciously destroyed or

as a building or building used or designed for human occupancy.

by means of a bomb, or had attempted to do so," or had aided or abetted in such a malicious act. We do not think that the published article is reasonably susceptible of such meanings, or any of them, as alleged in the innuendoes, or that the article is capable of such meanings. In the article plaintiff's name is only once mentioned, and it is stated that he and three other men "were arrested during the night * * and held at the Lawndale police station for questioning in the inquiry," and that "the arresting officers did not disclose their prisoners' exact connections with the ring." A reading of the entire article shows that two men, Peter Gunniff and Ray M. Williams, (previously convicted for "bombing outrages"), together with others, were being sought by the police in connection with certain recent beauty shop bomb explosions. The article does not state that plaintiff was in any way connected with the explosions, but only the fact that during the night he and others were arrested and held "for questioning in the inquiry."

Considering the published article, the allegations of the declaration, and the authorities above mentioned, we are of the opinion that the trial court properly sustained defendant's demurrer to the declaration and, upon plaintiff electing to stand by the declaration, properly entered the judgment in question against plaintiff. Accordingly, the judgment is affirmed.

AFFIRMED

Kerner, P. J., and Seanlan, J., concur.

... means of a bomb, or had attempted to do so," or had aided or
abetted in such a malicious act. We do not think that the published
article is reasonably susceptible of such meanings, or any of them.
... alleged in the introduction, or that the article is capable of
such meanings. In the article plaintiff's name is only once men-
tioned, and it is stated that he was there "as a witness."
During the night of the explosion at the Louisiana Police Station for
... in the industry," and that "the preceding article dis-
cusses their prisoners' exact connections with the riot." A
reading of the entire article shows that two men, Peter Gennell and
... (Louisiana Prisoners' Association for "Prisoner Outrages"), to-
gether with others, were being sought by the police in connection
with certain recent events. The article does
not state that plaintiff was in any way connected with the explosion,
nor only the fact that during the night he and others were arrested.
... held "for consideration in the industry."

... the published article, the allegations of
... and the authorities above mentioned, we are of
... opinion that the article does not contain defamatory
... upon plaintiff's character or name
... the defendant, expressly stated the purpose in writing against
... Association, the defendant is entitled.

VERIFIED

... and ...

35709

MILTON H. MCCOY and
EDWIN MULFORD, copartners
as McCoy & Mulford,
Defendants in Error,

v.

NELS SHOEN,
Plaintiff in Error.

67
7
ERROR TO CIRCUIT

COURT, COOK COUNTY.

267 I.A. 610''

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment for \$2922.50, rendered against him in an action of assumpsit on October 2, 1931, following a trial without a jury during July, 1931, at the conclusion of which the court found the issues for plaintiffs and assessed their damages at the sum of \$2922.50.

The action was commenced on July 22, 1930. Plaintiffs' declaration consisted of a special count and the common counts. In the special count they alleged that on July 15, 1929, they, as duly licensed civil engineers and registered surveyors at Chicago, were employed by defendant to draw and prepare certain topographic maps of certain farm lands, for which work defendant agreed to pay them at the rate of \$7 per acre; that plaintiffs did the work and delivered the maps which covered a total of 417-1/2 acres; and that no part of their claim against defendant has been paid, etc. Defendant filed a plea of the general issue and gave written notice of certain special defenses upon which he would rely at the trial, viz, (a) that he, individually, did not employ plaintiffs to do the work; (b) that he, individually, did not agree to pay to plaintiffs for the work at the rate of \$7 per acre, or at any other rate; and

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...and the fact that the ...

1. The individual is not employed by the

1. The individual, or group, who is the subject of the investigation, is not aware of the investigation.

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PUBLISHED WEEKLY
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(c) that if plaintiffs had any contract or agreement for the work, "it was with a number of persons as a syndicate and not with the defendant as an individual, and, therefore, there is a misjoinder of parties defendant."

On the trial it appeared from plaintiffs' evidence that before they commenced their survey work, etc., defendant signed and delivered to them a letter, addressed to them and dated July 15, 1929, as follows:

"You are hereby authorized to proceed with the drawing of a topographical map of a tract of land consisting of the Steger farm, Gaines Farm and Mueller farm. Said survey to show contour lines ten foot interval elevations, the price for said work to be \$7 per acre. Please rush this work as fast as possible.
(Signed) NELS SHOEN, Trustee."

It further appeared from plaintiffs' evidence that they did the work and delivered the map or maps within a reasonable time, and that the total number of acres surveyed was 417-1/2, which at \$7 per acre amounted to \$2922.50, and that no part of said sum had been paid to plaintiffs. Defendant did not contend at the trial that plaintiffs' work was not satisfactory or promptly performed. His sole defense was that he signed said letter as agent or trustee for a "syndicate" of various individuals, of which he was one, and that plaintiffs could not recover from him alone, because of the non-joinder of the other individuals comprising the so-called syndicate. There is no merit in the defense. It clearly appeared from the evidence that plaintiffs refused to proceed with the work until Shoen, by signing the letter, ordered or authorized the work to be done. The fact that the work may have been of benefit to individuals other than Shoen does not relieve him from liability. He authorized the work and became individually liable to pay for the same at the price mentioned. The fact that the word "trustee" appears after his name does not affect his individual liability. As

said in 1 Mechem on Agency, 2nd Ed., Sec. 1170, p. 361, "the mere addition to his signature of the title of his representative character, is prima facie to be construed as descriptive of the person only, and not as indicating an intention to charge a principal, and if, in such a case, the contract contains apt words to bind the agent personally, he will be held individually liable." (See, also, Mead v. Altgeld, 136 Ill. 298, 305.) Furthermore, assuming that there was a group or syndicate of individuals (including defendant) who wanted the work done, plaintiffs could properly sue one (i.e. defendant) of that group. (Cahill's Stat. Chap. 76, Sec. 3; Tandrup v. Sampson, 234 Ill. 526, 531; People v. Harrison, 82 Ill. 84, 86.)

Other grounds for a reversal of the judgment are here urged and argued by defendant's counsel, viz: (1) error in the court's refusal to grant defendant's petition for a change of venue; (2) error in placing the cause on the trial calendar in pursuance of rule 23 of the circuit court, because said rule is in violation of section 21 of the Practice Act; and (3) error in denying defendant the right of a trial by jury. After considering the present transcript we find no merit in any of these contentions. The motion and petition for a change of venue were presented after the court had refused defendant's motion for a continuance of the hearing. Furthermore, it does not appear that a reasonable notice of the application for the change of venue was given to plaintiff or his attorney. (See, Cahill's Stat. Chap. 146, sec. 5; Gloe v. Garrett, 219 Ill. 208, 213; Hutson v. Wood, 263 Id. 376, 381.) As to point 2, we do not think that said rule 23 can properly be considered a violation of section 21 of the Practice Act, which provides that "all causes shall be tried, or otherwise disposed of, in the order they are placed on the docket, unless the court, for good and sufficient cause, shall

[illegible]

otherwise direct." And we find no merit in counsel's argument that the court "forced the cause to trial out of its regular order," after it had been placed on the trial calendar. As to point 3, it does not appear that defendant in apt time asked for a jury trial. Furthermore, it does not appear that at the time of making the request, or at any time, he paid or offered to pay the fee for the services of the jury, as required by the statute. (Cahill's Stat. 1929, Chap. 33, Par. 47, Sec. 33, p. 1327.) It is therein provided that "such fee shall be paid by the plaintiff, * * at the time of the commencement of such action or suit, * * or, if not so paid by the plaintiff, * * shall be paid by the defendant, * * at the time of entering his appearance. If such fee shall not be paid by either party, no jury shall be called in the action, suit or proceeding, and the same shall be tried by the court without a jury."

Finding no reversible error in the present transcript the judgment of the circuit court of October 2, 1931, against defendant, is affirmed.

AFFIRMED.

Kerner, P. J., and Scanlan, J., concur.

otherwise directed." And we find no words in counsel's argument
that the court "found the case to trial one of the regular
cases," after it had been placed on the trial calendar. - 24
point 3. It does not appear that defendant in any time asked for
a jury trial. Furthermore, it does not appear that at the time
of making the request, or at any time, he paid or offered to pay
the fee for the services of the jury, as required by the statute.
Cecil's Case, 122 U.S. 187, 12 S.Ct. 100, 32 L.Ed. 117. It is
therein provided that "when the shall be paid by the plaintiff," &
the time of the commencement of such action or suit, & "if, if
it be paid by the plaintiff," & "shall be paid by the defendant," &
the time of entering his appearance. If such fee shall not be
paid by either party, no jury shall be called in the action, and
the proceeding, and the case shall be taken by the court without a
jury."

finding no reversible error in the present granting the
judgment of the circuit court of October 7, 1921, against defendant.

WITNESSES:
JAMES F. H. and HENRIETTA L. COLEMAN.

35713

CLAUDE T. FRAZIER,
Appellee,

v.

CONTINENTAL CASUALTY CO.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 610

MR. JUSTICE GRIBBSY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, commenced on September 10, 1931, and based upon defendant's policy of insurance, there was a trial without a jury on November 2, 1931, resulting in the court finding the issues in plaintiff's favor and assessing his damages at \$100. Judgment was entered against defendant upon the finding and the present appeal followed.

In plaintiff's amended statement of claim he alleged that he is, and has been since June 5, 1926, insured against accident and sickness by defendant under its certain policy (giving its number), which policy contains, among others, the following provision:

"PART VIII. INDEMNITY FOR OPERATIONS.

If injury or sickness sustained by the Insured and covered by this policy shall necessitate any surgical operation named in the schedule endorsed hereon and which is performed within 100 days of the injury, or the commencement of the sickness, the Company will pay the sum therein specified in addition to the indemnity otherwise given, but such payment shall not be made for more than one operation as the result of any one accident or sickness."

That in said schedule, headed "Schedule of Operations (Indemnities for surgical operations - see Part VIII," it is also provided that "if the single weekly indemnity named in this policy is \$50, the amounts payable shall be the respective amounts named below; if more or less than \$50, the payments shall be increased

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WILLIAM T. SHAW
PRESIDENT

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of the present appeal follows.

number), which policy contains, among others, the following statement by defendant under its certain policy (giving its date, and has been since June 2, 1936, issued against accident in plaintiff's accident statement of claim as alleged that

"That will, however, be a result of my own accident or illness."

That in said schedule, headed "Schedule of Operations" submitted for surgical operations - see Part VIII, it is also revised that "if the strike weekly indemnity named in this policy is \$500, the monthly periodic shall be the respective amounts named. If it more or less than \$500, the payments shall be determined

or reduced proportionately." And that in said schedule also is the following:

"Laparotomy (opening of the abdominal cavity for an operation on any organ contained therein, or for traumatic peritonitis or exploratory incision) - - - - - \$200."

That the amount of the weekly indemnity payable under the policy was \$25; that on June 14, 1931, plaintiff was taken sick and he was operated upon by Dr. R. C. Grain, who performed laparotomy upon him on June 15, 1931, which said date was within 100 days of the commencement of his sickness or injury; that plaintiff served due proofs of said sickness or injury upon defendant; but that, although defendant has often been requested, it has not paid to plaintiff the sum of \$100, which is due to him under said policy, and, therefore, he brings this suit, etc.

In defendant's affidavit of merits it denied that plaintiff was taken sick, from the disability for which he was operated upon, on June 14, 1931, as alleged, but on the contrary defendant says that "such sickness or illness occurred to-wit, two years before, and, therefore, does not come within the purview of Part VIII of said policy;" and that, hence, defendant is not indebted to plaintiff in any sum.

On the trial the policy was admitted in evidence by agreement. Plaintiff testified in substance that during the fall of 1929, he noticed "a little lump on his right groin;" that he consulted Dr. Grain who advised him to procure a truss and wear it; that he got a truss, wore it constantly and had no further trouble with the hernia until about June 1, 1931, when, because of a strain or injury received while going upstairs, he noticed that the hernia had greatly increased in size and "the intestine had come down in the opening;" that "there appeared to be a strangulation;" that he again consulted Dr. Grain who advised an operation; that Dr. Grain successfully performed the

operation on June 15, 1931; and a few days thereafter he delivered to defendant on a "regular claimant's form" a claim under the policy for \$100 for said operation. Dr. B. C. Crain, plaintiff's witness and a physician and surgeon with office in Chicago, testified in substance that he was first consulted by plaintiff "about a year and a half before he operated upon him;" that then plaintiff had a "very small inguinal hernia" and he then advised him to wear a truss; that about ten days prior to the operation plaintiff again consulted him; that he then found plaintiff's condition much worse; that the hernia "was down in the scrotum;" that the "bowel was obstructed;" that an operation was necessary and he so informed plaintiff; that he successfully performed the operation and reduced the hernia on June 15, 1931. Defendant did not introduce any evidence.

Defendant's counsel here contends that the finding and judgment are contrary to the evidence and against the express provision of Part VIII of the policy sued upon. The argument is that it appears that the operation on plaintiff was performed more than 100 days from the date of the injury or the commencement of his sickness. We cannot agree with the contention or argument. While it appears that plaintiff first had a hernia about a year and half before the operation was performed it was then a comparatively insignificant trouble, such as could be and was relieved or remedied by the wearing of a truss, as is commonly done. No operation then was necessary. But when, about June 1, 1931, plaintiff, as he testified, received said strain or injury, the hernia was so increased as to become a serious matter, requiring an operation. We think that under the undisputed evidence it should be held that plaintiff's injury was received, or that his real sickness commenced, about June 1, 1931. And it is undisputed that the operation was performed on plaintiff on June 15, 1931, (i.e. within the 100 days mentioned in the policy.)

The judgment appealed from is affirmed.

Kerner, P.J., and Scanlan, J., concur.

AFFIRMED.

operation on June 14, 1901, and a few days thereafter he delivered
a statement on a "regular statement" form, a claim under the policy
also for said operation. Dr. E. J. Green, Plaintiff's witness
a physician and surgeon with office in Chicago, testified in
evidence that he was first contacted by Plaintiff "about a year and
half before he operated upon him," that Green Plaintiff had a
very small inguinal hernia, and he then advised him to wear a truss;
he about ten days prior to the operation Plaintiff again consulted
him; that he then found Plaintiff's condition much worse than the
first "was shown in the record"; that the "hernia was obstructed";
that an operation was necessary and he so informed Plaintiff; that
Plaintiff refused the operation and refused the return on
Plaintiff's policy. Defendant did not introduce any evidence.
Plaintiff's counsel were advised that the finding and judgment
of the court in the instant case against the return provision
of the policy is the only one in the case. The return is that it
the operation on Plaintiff was performed more than two years from
date of the injury or the commencement of his sickness. He cannot
deny the operation or payment. While it appears that Plaintiff
first had a hernia about a year and half before the operation
performed it was then a comparatively insignificant trouble, and
would be not so relieved or removed by the wearing of a truss,
as commonly done. No operation then was necessary. But when, about
a year and half later, as he testified, Plaintiff said again to the
doctor, the hernia was no longer so so because a serious matter, re-
fused an operation. He said that under the medical witness is
that he had been told Plaintiff's injury was necessary, or that his test
was necessary, about June 14, 1901. And it is undisputed that the
operation was performed on Plaintiff on June 14, 1901. Under the
policy provided in the policy.)
The return provided that in Plaintiff's
testimony, the return, the return.

35727

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. Thordarson Electric
Manufacturing Co., a corporation,
Appellant,

v.

JEFFERSON ELECTRIC MANUFACTURING
CO., a corporation, et al.,
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

267 I.A. 611

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

On November 18, 1931, the circuit court sustained the general demurrer of respondents to petitioner's petition for a writ of mandamus and, petitioner electing to stand by its pleading, dismissed it and entered judgment against petitioner for costs. The present appeal followed.

In the verified petition, filed October 23, 1931, it is alleged that petitioner is and has been engaged in the manufacture of electrical appliances; that the two respondent corporations, Jefferson Electric Mfg. Co. and Chicago Jefferson Fuse & Electric Co., are engaged in a similar business; that the two individual respondents, John A. Bennan and Roger Foote, are respectively the president and secretary of both respondent corporations; that respondents infringed upon and violated the patent rights of petitioner, and as a result there was instituted in the U. S. District Court for the northern district of Illinois a suit against the two respondent corporations, and the litigation was terminated by the entry of a consent decree in favor of the complainant (petitioner); and that on May 19, 1930 (prior to the entry of said decree), a written agreement was entered into by and between

STATE OF ILLINOIS
JANUARY 1, 1921
JAMES M. HARRIS
JAMES M. HARRIS
JAMES M. HARRIS

STATE OF ILLINOIS
JANUARY 1, 1921
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JAMES M. HARRIS

STATE OF ILLINOIS
JANUARY 1, 1921
JAMES M. HARRIS
JAMES M. HARRIS
JAMES M. HARRIS

THE COURT OF THE STATE OF ILLINOIS

ON November 12, 1921, the court heard and decided the

case of JAMES M. HARRIS vs. JAMES M. HARRIS

and the court has decided in favor of JAMES M. HARRIS.

The court has decided in favor of JAMES M. HARRIS.

IN the year 1921, JAMES M. HARRIS, JR., is

the son of JAMES M. HARRIS, JR., and has been engaged in the business

of JAMES M. HARRIS, JR., and has been engaged in the business

of JAMES M. HARRIS, JR., and has been engaged in the business

of JAMES M. HARRIS, JR., and has been engaged in the business

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of JAMES M. HARRIS, JR., and has been engaged in the business

petitioner, therein called "Thordarson" and the two respondent corporations, therein called "Jefferson". The agreement is set out in full in the petition and is in part as follows:

Whereas the parties "are now involved in a suit," pending in said U. S. Court, in which Thordarson is complainant and Jefferson are defendants, "for the infringement of Letters Patent, No. 1,356,178, granted October 19, 1920, to Chester H. Thordarson, for MACHINE FOR CUTTING MAGNETIC CIRCUIT LAMINAE;" and whereas "the parties are desirous of terminating the litigation and settling their differences with respect thereto."

Now, Therefore, in consideration, etc., the parties agree as follows:

1. Thordarson gives and grants to Jefferson "the right to use and operate in their own business only, structures like and according to that shown and described in Patent No. 1,356,178."

3. "In case Jefferson exercise their license to use the structure of Thordarson Patent, No. 1,356,178, then and in such case Jefferson shall pay to Thordarson in cash, as royalty under said license, an amount equivalent to the saving effected in scrap material produced by the use of the Thordarson patent structure over the amount of scrap material produced by the use of the structure and method of the Daley patent, based on the initial cost of the raw material."

4. "In case Jefferson employ a die punching structure and method in the manufacture of magnetic core laminations, which is identified as being shown and described in Patent No. 1,718,176, dated June 18, 1929, or in case they employ" (Here are set forth other conditions), "then and in either or both of said cases Jefferson shall pay to Thordarson in cash, as royalty under said license, an amount equal to and at the rate of one-third ($1/3$) of one cent per pound of finished core structure for each laminated transformer core so manufactured."

5. Jefferson shall keep true and accurate books and records as to its manufacturing operations under this agreement and shall furnish to Thordarson, within the first ten days of each month of January, April, July and October, "a verified statement showing in detail the amounts of royalties which have accrued under this agreement during the preceding three months and have become due to Thordarson, and shall pay such accrued royalty coincidentally with the furnishing of said statements. And Thordarson shall have and is hereby given the right to inspect and examine the books and records of Jefferson for the purpose of verifying said statements."

7. That the suit hereinabove mentioned shall be terminated and ended "by the entry of a consent decree therein, to the effect that the Thordarson Patent, No. 1,356,178, is good and valid, that it is owned by Thordarson, that Jefferson have infringed the same, and that each party thereto pay its own costs therein but that no injunction issue and no accounting of profits and damages be made."

After directing particular attention to the last clause in paragraph 5 of the contract, petitioner further alleged that "demand has heretofore been made on respondents and each of them for the privilege and right to examine said books and records;" that petitioner sent over to respondents two persons (one a public

position, therein called "position" and the two positions
superposition, therein called "position". The movement of the

1,385,178. The defendant, "for the infringement of Letters Patent, No. 1,385,178, granted August 17, 1921, to Edward M. Thompson, for MACHINE FOR CUTTING CORRUGATED SHEET METAL," and whoever else infringes the same, is enjoined from doing so, and damages are assessed at \$10,000.00, with costs of \$1,000.00, and attorney's fees of \$5,000.00, to be paid by the defendant to the plaintiff within 30 days of the date of the entry of the judgment. The plaintiff is awarded its costs of \$1,000.00, and attorney's fees of \$5,000.00, to be paid by the defendant to the plaintiff within 30 days of the date of the entry of the judgment. The defendant is awarded its costs of \$1,000.00, and attorney's fees of \$5,000.00, to be paid by the plaintiff to the defendant within 30 days of the date of the entry of the judgment. The court is divided 3-2 in favor of the plaintiff.

nothing will ever be done, and the only way to get it done is to get the people to do it.

Follow us

[illegible][illegible]

3. Defendant shall keep true and accurate books and records as to the money-making operation under this agreement and shall furnish to Plaintiff, within the time and scope of each month's money, July, July and October, "a verified statement showing the amount of receipts which have entered under this agreement during the preceding three months and have been lawfully disbursed, and shall pay back to Plaintiff, immediately with the finalizing of said statement, the amount of money lawfully disbursed which shall be shown in the verified statement." Defendant shall keep true and accurate books and records as to the money-making operation under this agreement and shall furnish to Plaintiff, within the time and scope of each month's money, July, July and October, "a verified statement showing the amount of receipts which have entered under this agreement during the preceding three months and have been lawfully disbursed, and shall pay back to Plaintiff, immediately with the finalizing of said statement, the amount of money lawfully disbursed which shall be shown in the verified statement."

1. The first part of the report is a general statement of the purpose and scope of the study. It states that the purpose of the study is to determine the effect of the new tax law on the income of the individual taxpayer. The scope of the study is limited to the income of the individual taxpayer who is subject to the new tax law.

ALSO ATTACHED TO THE ABOVE IS A COPY OF THE

100-443887-100

...to the ... of the ...

For the purpose of this study, the following definitions were used:

accountant), properly equipped and skilled in examining records, books, etc., for the purpose of examining the records and books of the two respondent corporations "in so far as said records and books would relate to the contractual obligations to pay royalties in accordance with the contract;" that respondent corporations, by and through their said officers, "refused to permit petitioner's said agents to examine all of the records and books of said respondent corporations;" that, however, petitioner's agents were permitted to examine such portion of the same as the officers of respondent corporations "thought sufficient;" that the only book or record that was offered for such examination "was the ledger;" that "whereas it is necessary to trace the amount of royalties properly due your petitioner by examining shipping receipts, shipping records, purchase records, manufacturing records, contracts for purchase of commodities involved under the patents described in said contract, journals showing the character of goods purchased, how processed in manufacturing and the nature of the materials purchased for the purpose of manufacturing, and the manner in which such purchases were manufactured and disposed of;" that from the examination of such records, books and documents "a public accountant would probably determine the amount of material used by the respondent corporations in their manufacturing processes * * and the amount of royalties due from the respondent corporations to petitioner;" that petitioner's said agents or representatives "were refused the right to make the necessary examinations of the necessary records * * during the month of August, 1931;" and that "during the time said representatives were attempting to make a proper audit of the books, records and documents of the respondent corporations, to determine the correctness of the verified statements sent to petitioner, as required under the contract, said respondent corporations by its said officers refused to

...and, for the purpose of examining the records and books
of the two respondent corporations "in so far as said records and
books relate to the financial condition of said corporations
in connection with the operation of said respondent corporations, by
and through their said officers," "asked the petitioners
said agents to examine all of the records and books of said respondent
corporations," that, however, petitioners' agents were prevented from
examining such portion of the same as the officers of respondent
corporations "thought advisable;" that the only book or record that
was allowed for such examination "was the ledger," that
it is necessary to know the amount of royalties properly due your
petitioners for examining shipping receipts, shipping records, purchase
records, sales records, etc., for the purpose of ascertaining
whether or not the petitioners' interest in said receipts, purchase
and the nature of the materials purchased for the purpose of manu-
facturing, and the manner in which such purchases were manufactured
and disposed of," that from the examination of such records, books
and documents "a valid assessment could properly be made of the amount
of material used by the respondent corporations in their manufacturing
process," "and the amount of royalties due from the respondent
corporations to petitioners," that petitioners' sole interest in
respondent corporations "was to obtain the right to use the patent
invention of the patent machine," "having the right of
invention, 1911," and that "during the time said respondent corporations
attempted to make a valid claim of the patent, records and documents
of the respondent corporations, to determine the correctness of the
validity of the patent, as required under the law

permit such examinations to continue."

The prayer of the petition is that a writ of mandamus be awarded against respondents compelling them and each of them to permit and allow petitioner's said agents at reasonable times to carry into effect, and provide reasonable space for that purpose, "the proper examinations of the records, documents, shipping receipts and records, purchase records, manufacturing records, time sheets, and all other books, records and journals that the respondent corporations use in connection with keeping a record of their business affairs, to enable petitioner through its said agents to make a proper audit and examination of such records, etc., to determine the amount of royalties that have heretofore been earned by petitioner and due to it from said respondent corporations," and that petitioner may have such further relief in the premises as justice may require.

After reviewing the allegations of the petition we are of the opinion that the court properly sustained respondents' general demurrer thereto and, upon petitioner's electing to stand by the petition, properly entered the judgment appealed from. It clearly appears from the petition that petitioner is seeking to enforce by mandamus a right existing solely by virtue of a contract between two private corporations. In High on Extraordinary Legal Remedies, 3rd Ed., p. 33, sec. 25, it is said:

"From the nature of the remedy (mandamus) as thus far disclosed, it is obvious that it relates only to the enforcement of duties incumbent by law upon the person or body against whom the coercive power of the court is invoked. It is not, therefore, an appropriate remedy for the enforcement of contract rights of a private or personal nature; and obligations which rest wholly upon contract, and which involve no question of trust or of official duty, can not be enforced by mandamus. A contrary doctrine would necessarily have the effect of substituting the writ of mandamus in place of a decree for specific performance, and the courts have, therefore, steadily refused to extend the jurisdiction into the domain of contract rights."

Again the writer states in the same text book, p. 303,

sec. 321:

might such questions be considered?

The proper of the position in that a writ of mandamus

is awarded against respondents compelling them and each of them to

comply with their petitioners' rights without reasonable delay to

any other effect, and provide reasonable relief for that purpose,

the proper consideration of the various documents, including records

and records, physical records, annual financial records, law records, and

if other people, records and documents that the respondent corporations

as in connection with keeping a record of their business affairs, so

could petitioners through the said records be able to know what and

existence of such records, etc., so that the law of evidence

has been heretofore been known by petitioners and has so it has said

respondent corporations," and that petitioners may have such further

aid in the premises as justice may require.

After reviewing the allegations of the petition we are of

the opinion that the court properly sustained respondents' demand

therefore should not, upon petitioners' pleading as stated by the

petitioners, properly award the judgment requested there. It clearly

appears from the petition that petitioners are seeking to enforce by

enforce a right existing solely by virtue of a contract between two

private corporations. In such an eventuality legal remedies, the

law of the state, and the law of the United States, are

available to the remedy (mandamus) as the law

provides, it is evident that it relates only to the enforcement

of duties imposed by law upon the person or body against whom the

relief is sought. It is not, therefore, an

enforcement of the law of the state or of the United States, but

of the law of the state or of the United States, and the law of the

state or of the United States, and the law of the state or of the

state or of the United States, and the law of the state or of the

"Duties imposed upon a corporation, not by virtue of express law or by the conditions of its charter, but arising out of contract relations, will not be enforced by mandamus, since the use of the writ is limited to the enforcement of obligations imposed by law."

In this connection, and in support of the above statements, the following cases, decided in Illinois and other jurisdictions, may appropriately be cited; People v. Lulaney, 96 Ill. 503, 511; City of Chicago v. Chicago Telephone Co., 230 Ill. 157, 161; State v. Paterson, etc., R. Co., 43 N. J. L. 505, 512; Parrott v. City of Bridgeport, 44 Conn. 180, 182; State v. Trustees of Salem Church, 114 Ind. 389, 396; State v. Milwaukee Medical College, 128 Wis. 7, 12. In the last cited case it appears that on petition of the relator the trial court, after a hearing, awarded a peremptory writ of mandamus commanding the college to issue a diploma of graduation from its dental department, and that on appeal the Supreme Court of Wisconsin reversed the judgment and quashed the writ. The court said (pp. 12-13):

"The case made is clearly one of breach of contract, and the question arises whether mandamus will lie to compel a private corporation to perform its contract. * * Mandamus is a remedy only to be applied in extraordinary cases where there is no other adequate remedy. * * It is granted usually for public purposes to compel the performance of a public duty imposed by law. * * The writ lies to compel the performance of a public duty prescribed by statute, and to keep subordinate and inferior bodies and tribunals exercising public functions within their jurisdiction, and to compel in proper cases the performance of specific duties imposed by law. (Citing cases.) It seems, however, to be well settled that duties imposed upon corporations, not by virtue of express law or by the conditions of their charters, but arising out of contract relations, will not be enforced by mandamus. The authorities in England and this country appear to be quite uniform to this effect." (Citing many cases.)

In the present case the petition discloses the claimed breach by the respondent corporations of the provisions of paragraph 5 of the contract mentioned, relative to petitioner's right of inspection and examination of the books and records of said respondent corporations for the purpose mentioned.

Petitioner's counsel here refer to sec. 9 of our Mandamus

Act (Cahill's Stat. 1931, chap. 87, p. 1827), which provides that the proceedings for the writ "shall not be dismissed nor the writ denied because the petitioner may have another specific legal remedy, where such writ will afford a proper and sufficient remedy;" and counsel contend in substance that this section of our Act so enlarges the scope of the writ that now in this State mandamus should lie to compel an individual or a private corporation to perform its contract. We cannot agree with the contention. While the section provides that the writ shall not be denied because a petitioner may have another specific legal remedy, still this provision is conditioned, as we read the section, that the writ asked shall afford "a proper and sufficient remedy." The present petition, in our opinion, did not disclose that the writ under the law would be a proper remedy.

For the reasons indicated the judgment of the circuit court of November 18, 1931, should be and is affirmed.

AFFIRMED.

Kerner, P. J., and Scanlan, J., concur.

35737

PONSOVELLA C. SUNICO,
Appellee,

v.

DR. P. B. SCHYMAN and
HELEN SCHYMANSKI, copartners,
doing business as "S. M. S.
Health Service and Medical
Institute,"
Appellants.

64 7
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

267 I.A. 611²

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT:

In an action in case, commenced February 26, 1929, for damages for personal injuries because of claimed malpractice, there was a trial before a jury in November, 1931, resulting in a verdict finding defendants guilty and assessing plaintiff's damages at \$2500. On November 14, 1931, the court entered judgment on the verdict against both defendants, "doing business as S. M. S. Health Service and Medical Institute," and they appealed.

Plaintiff's declaration consisted of two special counts, to which each defendant filed a plea of not guilty, and a special plea denying the existence of a partnership between them or any joint liability. In the first count plaintiff averred that defendants, before and at the time of the committing of the grievances hereinafter mentioned, "were copartners," doing business in Chicago under the name and style of "S. M. S. Health Service and Medical Institute," were engaged in the business of treating and curing diseases and ailments of the human body, and "were pretending to treat and cure" such ailments and diseases; that on November 9, 1928, plaintiff "retained and employed defendants, for a reward then paid to them, to attend and treat plaintiff for the cure and relief of a certain sickness and malady under which she then was suffering;" that defendants

accepted the retainer and employment and, by their servant or agent, entered upon the treatment of plaintiff, and continued the same for two days following, during all of which time plaintiff was in the exercise of due care and caution for her own safety; and that defendants, by their servant and agent, "so unskillfully, carelessly and negligently conducted themselves" that, by and through the negligence, "the sickness or malady of plaintiff then and there became greatly increased and aggravated," and plaintiff underwent great and unnecessary pain and anguish, became sick, lame, disordered and weakened, and sustained permanent injuries, to her damage in the sum of \$10,000. The second count in somewhat different language contains substantially the same averments.

On the trial plaintiff testified in her own behalf, and she called as witnesses two physicians and two other persons. For defendants the principal witness was Francis Werner, a chiropractor. The defendant, Doctor Schyman, also testified. Helen Schymanski did not testify.

Plaintiff, a masseuse by occupation, testified on direct examination that about July 1, 1928, she first met Dr. Schyman at the "S. M. S. Medical Institute," located at No. 1369 North Robey street, Chicago; that she applied to him for a position there as a masseuse; that after some talk he told her to return and said that in the meantime he would consult with "his mother" - Helen Schymanski; that in a few days the witness returned, "saw them both" and there was further conversation about her being employed as a masseuse; that shortly thereafter she was employed at a salary of \$25 a week and entered upon her duties; that sometimes her work was directed by Dr. Schyman and sometimes by Mrs. Schymanski and that her weekly salary was paid in cash at times by the one and at times by the other, and that both "were around there most of the time;" that Doctor Schyman

accepted the retention and employment and, by their servant or agent,
entered upon the treatment of plaintiff, and continued the same for
two days following, during all of which time plaintiff was in the
exercise of due care and caution for her own safety; and that during
said, by their servant and agent, "as negligently, carelessly and
negligently conducted business" that, by the servant and agent,
"the exercise or failure of plaintiff from and from the exercise
injuries and damages," and plaintiff understands that and un-
derstands that said injuries, damages and, in fact, damages and was
and sustained permanent injuries, to her damage in the sum of \$10,000.
The record shows in evidence that plaintiff sustained permanent injuries
to her person and property.
On the trial plaintiff testified in her own behalf, and
was called as witness by the plaintiff and the other parties. For
the defendant the principal witness was Thomas J. O'Connell, a physician.
The defendant, Doctor O'Connell, also testified. Other witnesses
in the case were:
Plaintiff, a nurse, by deposition, testified on direct
examination that about July 1, 1905, she lived with Dr. O'Connell at
No. 2, E. Medical Institute, located at No. 1002 North Main
Street, Chicago, and she applied to him for a position there as a
nurse; that after some talk he told her to return and said that
in the morning he would speak with "his mother" - Helen O'Connell;
that in a few days she alone returned, "now then both" and there
was further conversation about her being employed as a nurse; that
plaintiff thereafter she was employed at a salary of \$10 a week and
remained upon her duties; that sometime her work was directed by Dr.
O'Connell and was directed by Mrs. O'Connell and that her work was
as held in each of them by the one and at times by the other, and

and Blanchard, both physicians and surgeons, worked there; that both waited on patients, diagnosed cases and prescribed medicines; that Mrs. Schymanski sold medicines; that she was "neither an osteopathist nor an M.D.;" that in November, 1928, and prior thereto, Dr. Werner worked as a chiropractor at the institute on Robey street, the offices of which were in a large 3-story building on the corner; that she (the witness) "knows quite a bit about 'chiropractic'; a patient is treated by 'thrusts' on the spinal column and over the entire body;" that she (the witness) worked at the institute for "quite a while;" that the institute had branch offices in other locations in Chicago; that one branch office was at 64 West Madison street and "that is where they sent me to take charge of it;" that "Dr. Schyman sent me to the West Madison street office to give massage treatments;" that prior to November 9, 1928, and after giving treatments there, she "contracted a severe cold," and she complained to Dr. Schyman about the place being too cold, etc.; that on November 9th, Dr. Schyman told her to go to the institute on Robey street "for treatment" and she did so; that

When I got there I spoke to Dr. Schyman. He told me to prepare for treatment in booth No. 4. I stripped to the waist and got on the table. Dr. Schyman and Dr. Werner came in. Dr. Werner treated me, after Dr. Schyman had given orders to him and had left. Dr. Werner started working on the shoulder blade, gave me thrusts, placed his hand this way (indicating) and gave me very hard thrusts. I told him it hurt very much. He said, "That is all right; that is not hard," and he thrust again, and at the third time I screamed and could not see anything but black. The third thrust was very painful. When I was coming to, Doctors Blanchard, Schyman and Werner were over me, and Dr. Schyman was doing something to my back, - I don't know what. He gave orders to Dr. Werner "to put the deep therapeutic on my spine." That is a very large head-light that carries 1,000 watts; they turned it on by a switch; the light is on a stand; and it gives very good treatment. I was under that treatment for about an hour. Then I was helped to my feet. I was too weak to walk and was put back on the table to rest. After resting about an hour I was taken home by Dr. Schyman and went to bed. Dr. Blanchard came and took my temperature and pulse. He came again 4 or 5 times and treated me. I was in a "bad condition," suffering all kinds of pains. Then a nurse came and was with me nearly a week. I was in bed about two weeks and was given medicines by Drs. Blanchard and Schyman. After the two weeks I was able to go back to the Institute. I went back because I wanted to work. I

worked two days but could not keep on. I fainted, fell to the floor, and was taken home again. Dr. Schyman again called on me, also Drs. Werner and Blanchard. I was in so much pain I don't know whether or not they gave me any more treatments.

About "three weeks" after the "injury," Dr. W. C. Rogers was called. He examined me and took me to Dr. Orlando Scott for X-rays, and X-ray pictures were taken at Dr. Scott's office. Subsequently Dr. Rogers "strapped me and gave me therapeutic treatments." He called on me about 20 times. It was over two months before I could do anything. Then I commenced working for the Bloom Lamp Shade Co., where I "laced shades, sitting down." I could not do massage work, as it caused too much pain in my back. At first, I got \$8 per week, working from 8 a.m. to 5 p.m.; then in about three weeks I started to paint lamp shades, and worked up to getting \$15 per week, by piece work. I worked for the Lamp Shade Co. for about a year and one-half. About a year ago I went back to massage work at my home in Chicago. I cannot now do all that work myself, because I still have pain when stormy weather comes.

On cross-examination plaintiff testified in part:

I am a post graduate masseuse and have a license. I am familiar with anatomy. I don't think I know how many dorsal vertebrae there are. I know from the doctor telling me which of my vertebrae were injured; they were the 8th dorsal vertebra and the 4th dorsal vertebra. "Dr. Rogers strapped my back; it was not only the back, but the chest and all; I couldn't stand up unless I was strapped." My cold was not present when he strapped me; it was the vertebrae that hurt me "and the broken ribs;" I don't know how soon after the injury my cold disappeared. I was in severe pain; it was in my back and ribs - the fourth rib, and my spine pained and my sternum. There was a numbness in the chest and spine, and "my entire back ached in the area of the vertebrae." My chest and ribs "hurt terribly and were numb at the same time." During the year and a half that I was with the Lamp Shade Co., I suffered continuous pain, and Dr. Rogers took care of me during all that time.

Dr. Nathaniel S. Rogers (plaintiff's witness) testified on direct examination that he is a practicing physician and surgeon, duly licensed, with office in Chicago; that he commenced the practice of his profession in 1907; that he first treated plaintiff "at his office on November 22, 1928;" that he "made a physical examination and a tentative diagnosis and an appointment for the taking of an X-ray picture at Dr. Orlando Scott's office the following day;" that from his examination of plaintiff

I found injuries to the chest and severe tenderness. I suspected lacerations of the ligaments on the joint of the collar bone; I also found tenderness on the ribs - the third or fourth; I also found injury to the spine - the 8th dorsal vertebra. I was present when the X-ray picture was taken in Dr. Scott's office by Dr. Scott. The picture was taken on a standard machine and in a proper manner (X-ray picture shown witness, marked for identifi -

1. The first of these is the fact that the
2. second of these is the fact that the
3. third of these is the fact that the
4. fourth of these is the fact that the
5. fifth of these is the fact that the

1. The following information was obtained from the records of the Federal Bureau of Investigation, Bureau of Prisons, and the United States Department of Justice, regarding the activities of the "Black Panther Party" (BPP) in the United States:

I am writing you now as all your work
has been so busy. I cannot now do all your work
as I have a few more things to do. I will
be back soon. I will be back soon.

On view—until 13 January 2007—

[illegible][illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British intelligence services in the United States.

On November 22, 1963, the "New York Times" published an article titled "The Assassination of President Kennedy" which stated that the President was shot by a lone gunman, Lee Harvey Oswald, on the Texas School Depository in Dallas, Texas. This article was widely read and discussed, and it was one of the first major news stories to be reported on television. The article also mentioned that the President was shot while he was in a motorcade through the city of Dallas, and that the shooting took place at a point just south of the Texas School Depository. The article was a significant event in the history of the United States, and it led to a series of investigations and inquiries into the assassination of President Kennedy.

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1. The above information was obtained from a confidential source who has provided reliable information in the past. The source has provided information in the past which has been used by the FBI in the past.

cation "Plff's Exhibit A".) This picture shows that there is a laceration of ligaments that hold the collar bone to the sternum on the left side; there is evidently a fracture of the fourth rib; the spine I am not going to attempt to read; I will let Dr. Scott read that; "I cannot read the spinal fracture." I have seen plaintiff two or three dozen times. My treatment of her "was rest and quiet, and heat, and therapeutics, and straps." I have called upon her about half a dozen times since November 1928 to the present time. "I made her a charge of \$50; she is in the profession."

A hypothetical question was then put by plaintiff's attorney to Dr. Rogers as an expert witness. It was based upon the testimony of plaintiff as to her claimed injuries received on November 9, 1928, by the hands of Dr. Werner, the chiropractor in Dr. Schyman's employ. It did not contain all the necessary elements for such a question and was objectionable, but it does not appear that defendant's attorney made any objection to the question. At the conclusion of the stated hypotheses the witness was asked if he had "an opinion whether or not these injuries might have been caused by the trauma?" And the witness, upon stating that he had an opinion and being further asked what it was, stated that "I believe that such manipulation would cause such injuries." No motion was made by defendant's attorney to strike out the answer.

On cross-examination Dr. Rogers, after replying to further questions as to what in his opinion the X-ray picture disclosed, testified: "I couldn't say that there was a fracture of the fourth rib; the fracture, if there was one, was probably a green stick fracture, a very short distance from the sternal end; I found tenderness in the region of the fourth dorsal; I didn't diagnose any fracture of the fourth dorsal; I first saw plaintiff about two weeks after the alleged accident; I didn't know, of course, the condition of her spine or her ribs before the time I first saw her; I cannot remember right now any case in my own experience where the impact of the hands, as used by chiropractors, has ever caused a fracture of a rib or the fracture of a vertebra in a human being before this

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anyway to strike out the answer.

would come such injuries." He asserted was made by defendant's

asked what it was, stated that "I believe that such manipulation

and the witness, upon stating that he had no opinion and being further

asked as to what injuries might have been caused by the blow?"

at his stated department the witness was asked if he had an opinion

that a blowy could not injure in the question. At the conclusion

question was not objectionable, but it does not appear that he had

any. It did not include all the necessary elements for such a

of 1911, by the books of Dr. Henry, the physician in Dr. Henry's

testimony of himself as to how claimed injuries received on November

attorney to Dr. Henry as an expert witness. It was noted upon the

On cross-examination Dr. Leggett, after testifying to the fact that he had seen the body of the deceased in the room in which the body was found, testified that he had seen the body in the room in which the body was found, and that he had seen the body in the room in which the body was found.

case; that is really the first such case that has ever been called to my attention." On redirect examination the witness further testified that such injuries as he has described "could be caused" by the sharp pressing of the hands on the back of a patient.

Dr. Orlando P. Scott, plaintiff's witness and a licensed physician and surgeon practicing in Chicago, testified in substance as follows:

"I examined plaintiff at my office on November 24, 1928. I also "examined some X-rays that she brought to me." I made a physical examination of her at the time. I found from that examination that "there was some rigidity in the muscles of the back immediately over the left side, back of the chest and in towards the spine; there was also some rigidity and tenderness over the left chest near the inner end of the collar bone." I don't recall whether or not I took any X-ray pictures of her at that time. My records indicate that I examined the X-rays that she brought to me. (Witness shown an X-ray picture, marked for identification "Plff's Exhibit 1") "This is my X-ray film, taken in my laboratory and so marked; it was taken on November 19, 1928 (i.e., ten days after plaintiff says she received her claimed injuries at the Institute on Robey street.) I was present when the picture was taken. It was taken by a standard machine which was in good working order. This X-ray picture "shows an unusual thickening of the attachment to the inner end of the collar bone and the breast bone; there is no indication of joint shadow there; this is a very poor light; that is all the pathology in this film that I can see with this light." She brought in an X-ray picture to me on November 24, 1928. I read it. My recollection is that it was marked as being taken at the American hospital. "Apparently from the mark on this plate of mine it was made on November 11th, so I must have made my plates before she brought hers in, because she brought hers on the 24th."

The present transcript does not show that plaintiff introduced in evidence either this X-ray picture, marked for identification "Plff's Exhibit 1," or the other X-ray picture, which Dr. Rogers read, marked for identification "Plff's Exhibit A." While Dr. Scott was on the stand a hypothetical question was put to him as an expert by plaintiff's attorney, to which objection was made on the ground that it assumed certain material hypotheses not warranted by the evidence, but the court overruled the objection and Dr. Scott expressed the opinion that "based on reasonable medical certainty, there is connection between the accident and the manipulation described in the question, and this condition developed as shown in the X-ray picture some three weeks later."

case; that in nearly the same case that has been called
to my attention. On further examination the witness further testi-
fied that such injuries as he has described would be caused by the
sharp pressure of the hammer on the back of a person.

Dr. Charles E. Scott, Plaintiff's witness and a physician
testified and examined the witness, testified in substance
as follows:

"I examined Plaintiff at my office on November 24, 1918.
I also examined him at my home on November 25, 1918.
Physical examination at that time showed that Plaintiff had
examination that "there was some stiffness in the muscles of the
back immediately over the lower ribs, back of the elbow and in
between the elbow and the wrist and some tenderness over
the left elbow joint and at the wrist joint. I saw
Plaintiff at my office on December 1, 1918 and at that time
I made a further examination and I noticed that the pressure of my
fingers upon the lower ribs, caused the Plaintiff to cry out
(Plaintiff said he was in pain) and in my laboratory and as
stated it was taken on November 24, 1918 (1918). On that date
Plaintiff was not present but Plaintiff's father, Mr. Plaintiff,
was present when the witness was taken. It was
taken by a mechanical machine which was in good working order. The
"X-ray plates" showed no unusual relationship of the vertebrae in
the lower end of the spinal column and the spinal cord itself is
normal at (lower thoracic level) there is a very good looking
in all the pictures in this film (and I saw the film film). I took
the records of my X-ray plates so the X-ray plates of the
12. My examination is that it was marked as being of some
marked condition. "Plaintiff's film was in this stage of some
it was made on December 1, 1918, as I said that was my last before
the strength was in, between the vertebrae and the ribs."

The present testimony does not show that Plaintiff in-
jured in contact with this X-ray plates, which Dr. Scott's testi-
mony "X-ray plates 12" on the other X-ray plates, which Dr. Scott's testi-
mony for identification "X-ray plates 12" which Dr. Scott was
on the stand a hypothetical question was put to him as an expert in
Plaintiff's testimony, to which objection was made on the ground that
it seemed certain that hypothetical questions were competent in the witness,
but the Court overruled the objection and Dr. Scott answered the
question that "based on reasonable medical testimony, there is no connection
between the condition and the mechanical condition in the present,
and this testimony is not an expert in the X-ray plates and

Plaintiff's witness, Otto Kraus, testified that during November, 1928, and for a few months prior thereto, he was employed at the "Health Institute" on Robey street as janitor and "handyman"; that Dr. Schyman was the "director" of the Institute; that both he and Mrs. Schymanski "gave orders"; that he "worked for Dr. Schyman;" that one of the signs on the building was "S.M.S. Health Institute;" and that there was another sign reading "Dr. Schyman, specialist in all diseases."

Defendants' first witness was Elsie Kock. She testified in substance that in October, 1928, she was a patient of Dr. Schyman at the Institute on Robey street; that plaintiff there gave her some massage treatments; and that on one occasion plaintiff told her that she did not feel very well, that she had had a hemorrhage, and that she was sickly and could not work very well as a masseuse.

Dr. Francis Werner, defendants' witness, testified in substance that he is a licensed chiropractor; that in June, 1928, he graduated from the National College of Chiropractic; that Dr. Schyman employed him as a chiropractor at the Institute on Robey street during the months of September, October and November, 1928; that plaintiff was also employed by Dr. Schyman as a masseuse; that during the latter part of October or early part of November, 1928, plaintiff complained to the witness of having a severe cold, of running a temperature and that her "neck was very sore"; that

She became ill, and on November 9, 1928, the witness treated her professionally in Dr. Schyman's office. Her cold seemed to be getting worse. Dr. Schyman came into the office and asked what the trouble was. She replied that she was sick. Dr. Schyman told me to give her an "adjustment." I said "I don't think we have a proper table to give adjustments." He said: "Well, take care of her." So I gave her a very mild treatment, just a manipulation or massage of the spine. I was cautious not to cause any injury. The manipulation took probably ten minutes. Then I applied light to allay the inflammation and take away the pain from the spine that usually accompanies a hard cold or gripe. "After the treatment she arose and walked away." During the treatment "I didn't hear her scream or cry." We usually give adjustments by

thrusts on the spinal column at specific vertebrae to influence certain organs. I used skill and care in giving the treatment. It was given with open hands. I didn't give any twisting or violent adjustments to her. I wanted to adjust the cervical vertebrae, that is the bones of the neck in here (indicating); they influence the throat and nose in nasal, catarrhal conditions. She told me before the treatment that the cervical region was sore.

Dr. Schyman, called as a witness in his own behalf, testified that he is a licensed physician and surgeon, a graduate of Loyola University Medical College, and had been practicing his profession for eleven years; that plaintiff and Dr. Werner were both his employees; that early in November plaintiff contracted a severe cold and gave treatment to herself at the Institute; that the witness became concerned about her condition as he noticed that she had been spitting up blood; that on one occasion early in November, 1928, he found that Dr. Werner had been giving her a treatment; that he then personally examined her and found evidence of an acute cold, coughing, rapid pulse and high temperature; that he advised her to go home and rest for a while; that while she was at home both he and Doctor Blanchard called on her at her home and prescribed for her; that Dr. Blanchard is now dead; that plaintiff returned on November 17, 1928, and resumed her work at the branch office at 64 West Madison St.; and that she remained there until November 27, 1928, when she left the employ of the witness.

Numerous contentions are here made and argued by counsel for defendants, as grounds for a reversal of the joint judgment against defendants. As we have reached the conclusion, after a careful review of the present transcript, that in the interest of justice there should be another trial of this case, we deem it unnecessary to refer to all of the contentions. Suffice it to say that we are of the opinion that there is substantial merit in counsel's contention that the verdict and judgment are against the manifest weight of the evidence. We do not think that, under all

[illegible]

Dr. Johnson, called as a witness in his own behalf, said:

That he is a Russian spy and assassin, a number of Jews

for eleven years) and Gladhill and Dr. Brown were both his seniors at University Medical College, and had been practicing his profession

was that early in November 1941, a Soviet ship was

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100-100000-1 about her condition as he believed that had been advised

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Dr. Jorgensen has been giving out a statement: that he had personally

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and with consequences; that he advised her to go home and rest for a

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and a further investigation of the same.

and Pesticides are discussed. See Jeffrey and Hall, *editorial*, *ibid.*

the testimony and circumstances disclosed, it can be said that plaintiff's claimed injuries were proximately caused by the treatments given on November 9, 1928, by Dr. Werner, a chiropractor, and an employee and agent of Dr. Schyman. Furthermore, we do not think that the joint judgment against both defendants has any support in the evidence. The alleged partnership between them, as charged by plaintiff, was denied by special pleas and we do not find anything in plaintiff's evidence, or in the entire evidence, that they were partners, engaged in running and managing the so-called "Medical Institute," as such. And it does not appear that the defendant, Helen Schymanski, was in any way liable for the claimed negligent acts, if they were negligent, of Dr. Werner, the employee and agent of Dr. Schyman. She did not participate in the treatment. Clearly the judgment against her cannot stand. And, it being a unit, the judgment must be reversed as to both defendants, even if it could be held (which it cannot in our opinion) that the verdict and judgment against Dr. Schyman was sufficiently supported by the evidence.

The judgment of the circuit court of November 14, 1931, appealed from, is reversed and the cause is remanded.

REVERSED AND REMANDED.

Kerner, P. J., and Scanlan, J., concur.

35756

OTTO STRICKLAND,
Appellant,

v.

WALTER G. MCINTOSH and
JAMES BALODIMAS,
Appellees.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

267 I.A. 611³

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Complainant seeks by this appeal to reverse a decree of the superior court of Cook county, entered October 27, 1931, wherein the court followed the findings and recommendation contained in the report of the master to whom the cause had been referred, confirmed the report and ordered and adjudged

"That the temporary injunction heretofore issued herein on August 28, 1931, restraining the defendant Walter G. McIntosh, his agents, confederates, solicitors and attorneys from letting, leasing or permitting to be occupied the premises described in the amended bill of complaint as a barbecue stand and gasoline and oil station, and restraining said James Balodimas, his agents, confederates, solicitors and attorneys from operating, conducting or maintaining a barbecue stand and oil and gasoline station on the premises known as the southwest corner of River Road and Grand Avenue, River Grove, Illinois, and restraining said defendants from in any manner attempting to injure, damage or destroy the business of the complainant and from in any manner unfairly competing with the business of said complainant, be and the same is hereby dissolved, and the said injunction shall at all times hereafter be held and taken for naught."

"That this cause be and the same is hereby dismissed out of this court at complainant's costs, for want of equity, but jurisdiction is retained for the purpose of suggestions of damages and of passing upon suggestions of damages." And that defendants recover of complainant their costs, etc.

Complainant's original verified bill for an injunction against defendants was filed on August 7, 1931. His application for a temporary injunction was denied, and, before answers, he was given leave to file and filed an amended and verified bill, upon which the court on August 28, 1931, granted the temporary injunction

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24 JOURNAL OF ENVIRONMENT & DEVELOPMENT

1. *Journal of the American Medical Association*, 1997; 277: 1033-1037.

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4. The above information was obtained from the following sources:

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nevertheless followed the findings and recommendations.

Exhibit 10-10

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*This was originally submitted as a letter to the Editor.

we suggest that 1991's results may be subject to a number of limitations:

1. The first part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them. The list includes names such as "John A. Smith", "Mrs. J. B. Jones", and "Mr. C. D. Brown".

Die drei ersten sind durch die folgenden 12

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20. The following information is for the year ended 31/12/2019:

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Published online 12 January 2006 in Wiley InterScience (www.interscience.wiley.com). DOI: 10.1002/anie.200525401

(continued from page 6)

Healthcare systems will need to develop new health care administration programs

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mentioned. Thereafter each defendant filed separate answers, to which complainant filed replications, and the several motions of the defendants to dissolve the temporary injunction were denied, and the cause was referred to the master to take evidence and report the same and his conclusions of law and fact. A hearing was had before the master, at which both parties introduced oral and documentary evidence. The master's report was filed on October 14, 1931, in which, after making numerous findings of fact and certain conclusions of law, he recommended that the temporary injunction be dissolved and that complainant's bill be dismissed for want of equity. Among the master's findings of fact are the following:

1. That the defendant McIntosh was the owner of a parcel of land, with an improvement thereon known as the northwest corner of River Road and Grand Avenue, in River Grove, Cook county, Illinois, and was also the owner of another improved parcel of land known as the southwest corner of said highways.

2. That on or about March 12, 1929, complainant commenced negotiations with one Rush C. Smith, then in the employ of McIntosh as manager for the leasing of said northwest corner; that as a result of the negotiations McIntosh executed and delivered to complainant a written lease, dated March 19, 1929, of said northwest corner for a period of two years, expiring April 30, 1931, - the premises to be used for "a gasoline and oil station, barbecue stand, grocery and confectionery store," and at a rental of \$125 per month for the first year and \$175 per month for the second year of the term.

3. That before the expiration of the lease the parties, by mutual agreement on April 28, 1930, extended its term to April 30, 1933, - the rental to be \$175 per month from May 1, 1931 to April 30, 1933.

4. That on July 13, 1931, the parties by mutual agreement further extended the term of the lease for three additional years, viz, from May 1, 1933 to April 30, 1936, and for a rental for the extended period of \$190 per month for the first year, \$200 per month for the second year and \$225 per month for the third year.

5. That some time in April, 1929, complainant took possession of the premises on said northwest corner, and thereafter expended the sum of \$3500, "by way of repairs, alterations and equipping the premises for use as a barbecue stand and oil station; and that at all times since April, 1929, complainant has been conducting and operating a barbecue stand and oil station at said northwest corner."

6. That when complainant first commenced negotiations with McIntosh for the leasing of said northwest corner, he requested of McIntosh that the latter "agree not to rent or lease the opposite corner (i.e., said southwest corner) for use as a barbecue stand;" and that the discussion concerning this restriction on the use of said southwest corner "was had prior and contemporaneous with the execution of the written lease * * heretofore mentioned."

7. That defendant McIntosh "never entered into any independent collateral agreement with complainant wherein and whereby

mentioned. Thereafter each defendant filed separate answers, in which defendant filed objections, and the several motions of the defendant to dismiss the temporary injunction were denied, and the cause was referred to the master to take evidence and report thereon and his conclusions of law and fact. A hearing was had before the master, at which both parties introduced oral and documentary evidence. The master's report was filed on October 14, 1931, in which, after reciting the facts of the case and stating the findings of fact, he recommended that the temporary injunction be dissolved and that complainant's bill be dismissed for want of equity. Among the master's findings of fact are the following:

1. That the defendant Malinich was the owner of a parcel of land, with an improvement known as the Malinich garage, of River Road and Grand Avenue, in River Grove, Cook County, Illinois, and also the owner of another improved parcel of land known as the Malinich corner of said highway.
2. That on or about March 18, 1927, complainant commenced negotiations with one Frank O. Smith, then in the employ of Malinich, as manager for the location of said improved corner and as a result of the negotiations Malinich executed and delivered to complainant a written lease, dated March 18, 1927, of said improved corner for a period of ten years, expiring April 30, 1937. The premises to be used for "garaging and oil station, hardware stand, grocery and miscellaneous stores," but at a rental of \$125 per month for the first year and \$175 per month for the second year of the term.
3. That before the expiration of the lease the parties by mutual agreement on April 24, 1930, extended the term to April 30, 1935, at a rental to be \$175 per month from May 1, 1931 to April 30, 1935.
4. That on July 12, 1931, the parties by mutual agreement further extended the term of the lease for three additional years, viz. from July 1, 1935 to April 30, 1938, and for a rental for the extended period of \$175 per month for the first year, \$200 per month for the second year and \$225 per month for the third year.
5. That from time to time, 1929, complainant took possession of the premises on said written lease, and thereafter expressed the use of the premises "by way of restaurant, oil station and garage for use as a hardware stand and oil station; and that as all these uses were, in fact, prohibited, and hence complainant was operating a hardware stand and oil station at said premises contrary to the terms of the lease."
6. That when complainant first commenced negotiations with Malinich for the location of said improved corner, he suggested to Malinich that the latter "would not so much or lease the property for use as a hardware stand" (for use as a hardware stand); and that the discussion concerning this restriction on the use of said improved corner "was not mentioned."
7. That defendant Malinich "never entered into any negotiations with complainant for the location of the Malinich corner of said highway."

McIntosh agreed not to lease or rent said southwest corner * * for use as a barbecue stand."

8. That the money expended by complainant, by way of repairs, alterations and equipping said northwest corner for use as a barbecue stand and oil station, "was not as performance of any obligation imposed upon him by the terms of any independent collateral agreement."

9. That at the times of the making of the two extension agreements, extending the original term of the lease of said northwest corner, "no discussion or conversation was had between the parties concerning any restriction against the leasing of said southwest corner * * for a barbecue stand."

10. That on April 16, 1931 (i.e., before the expiration of the original term of the lease and before the agreement for the first extension thereof had been made) the defendant McIntosh, by written lease, leased said southwest corner to one William G. Mackris "for use as a grocery, restaurant, barbecue and gas station;" that thereafter the defendant Balodimas was associated as a partner with Mackris in the enterprise conducted on said southwest corner; that defendant Balodimas and Mackris continued to occupy that corner up to June 5, 1931; that on that day an oral agreement was entered into between McIntosh, Mackris, James Balodimas (defendant), and Gus Balodimas (his brother), that the written lease for said southwest corner, then in the name of Mackris and held by him, should be transferred to Gus Balodimas for the use of James Balodimas (defendant) and Gus Balodimas; that thereafter, on August 11, 1931, as a result of the oral agreement, a new written lease was entered into between McIntosh and Gus Balodimas, wherein and whereby there was leased by McIntosh to Gus Balodimas said southwest corner, - the same to be used as a grocery, restaurant, barbecue and gas station; that defendant James Balodimas and his brother Gus, "while without knowledge and notice, prior to August 6, 1931 (i.e., the day before the present action was commenced) of the said claim of complainant, expended the sum of \$2500 in altering, repairing and equipping said southwest corner, to be used by them as a barbecue stand and oil station, and obligated themselves by written contracts of various kinds for fixtures, barbecue roasters, oil pumps, etc. to a large sum of money, to-wit, an additional sum of \$6,000;" and that defendant James Balodimas and his brother Gus "at all times prior to said August 6, 1931, were without notice or knowledge of the fact that said complainant, Strickland, claimed the benefit for himself of a restriction against the use of said southwest corner * * for a barbecue stand, by reason of an alleged agreement made between complainant and the defendant, McIntosh."

Among the master's conclusions of law, as contained in his report, is the following:

"2. That the complainant has failed to establish by his proof the existence of an independent, collateral agreement between himself and the defendant, McIntosh, restricting McIntosh from leasing or renting the southwest corner * * as a barbecue stand, and has failed to establish by his proof the existence of any agreement entitling him to equitable relief by way of injunction, as prayed for by him in his amended bill."

The main contention of counsel for complainant is that the decree, which follows the findings and conclusions of the master,

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is against the manifest weight of the evidence. After carefully reviewing the oral and documentary evidence we find no merit in the contention. We think that all of the findings and conclusions of the master are sufficiently sustained by the evidence and that the court did not err in dissolving the temporary injunction and dismissing complainant's bill for want of equity. Several legal propositions are urged and argued by complainant's counsel in his brief, but we do not think it necessary to consider them. Complainant's case depended upon his maintaining the burden of proving the making and existence of the oral agreement as charged in the amended bill. Among the master's findings is the finding, sustained by the court in the decree, that the defendant McIntosh "never entered into any independent collateral agreement with complainant wherein and whereby McIntosh agreed not to lease or rent said southwest corner * * for use as a barbecue stand." This particular finding, in our opinion, is sustained by a clear preponderance of the evidence.

The decree of the superior court entered October 27, 1931, should be and is affirmed.

AFFIRMED.

Kerner, P. J., and Senlan, J., concur.

35765

PAOLO FABBRI and
ROSALINDA FABBRI,
Appellees,

v.

FRANK GERWISCH,
Appellant.

667
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 611⁴

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of the 4th class in contract, commenced on July 9, 1931, there was a trial without a jury resulting in the court on November 18, 1931, finding the issues against the defendant, Gerwisch, assessing plaintiffs' damages at \$177.79, and entering judgment against Gerwisch in that sum. The present appeal followed.

The action as originally commenced was against Gerwisch and one Mathias F. Perz, an attorney-at-law, as defendants, but during the trial plaintiffs dismissed the action as to Perz. In plaintiffs' statement of claim they alleged in substance

That plaintiffs' claim is for \$170, paid to defendant on August 8, 1930, "under a mistake of fact," and accrued interest on the sum from that date, amounting to \$7.79; that on May 21, 1929, plaintiffs were the owners of certain improved real estate (describing it) in Chicago; that on the last mentioned date they, as owners of the property entered into a contract with one Ricciardi, as original contractor, whereby the latter agreed to furnish all materials and labor for the completion of a back porch on the property; that Ricciardi sublet the contract to Gerwisch, as sub-contractor; that the work was completed during June, 1929; that during August, 1929, plaintiffs paid to Ricciardi the sum of \$418 "in full for all work done under the contract;" that on October 23, 1929, Gerwisch, by his solicitor, Perz, filed a petition in the superior court of Cook county, case No. 507,576, against plaintiffs as owners, and Ricciardi, as contractor, to enforce his claimed mechanic's lien as a sub-contractor on the premises for the sum of \$172.25; that on May 8, 1930, Ricciardi, through his attorney, one Landise, paid to Gerwisch, through his attorney Perz, the sum of \$120 "in full payment of all claims between Gerwisch and Ricciardi;"

1935

APPEAL FROM JUDICIAL
COURT OF CHICAGO

APPEAL FROM JUDICIAL
COURT OF CHICAGO

COURT OF CHICAGO

2871 A. 111

APPEAL FROM JUDICIAL
COURT OF CHICAGO

MR. JUSTICE WILLIAMS THE CHIEF OF THE COURT.

In an action of the 4th class in contract, commenced
on July 9, 1931, there was a trial before a jury resulting in
the court on November 18, 1931, finding the issues against the
defendants, granting, according to plaintiff's demand as set forth,
and entering judgment against defendant in that sum. The proceeds
appeal follows.

The action as originally commenced was against defendant
and one Mathias F. Fox, an attorney-at-law, as defendants, but
during the trial plaintiff dismissed the action as to Fox, in
plaintiff's statement of claim they alleged in substance

That plaintiff's claim is for \$175, paid as follows:
On August 8, 1930, "under a mislaid of hand," and entered interest
on the sum from that date, amounting to \$17.50 due on May 31,
1931. Plaintiff was the owner of certain improved real estate
(located in Chicago) and on the last named date (May 31,
1931) the property was sold to a plaintiff and one defendant,
an original contract, whereby the latter agreed to furnish all
materials and labor for the completion of a house upon the
property; and plaintiff agreed to complete the house, on con-
sideration; that the work was completed during June, 1931; that
during August, 1931, plaintiff paid to defendant the sum of \$175
"in full for all work done under the contract," that on October 20,
1931, defendant, by his attorney, Fox, filed a petition in the
superior court of Cook County, State of Illinois, against plaintiff
as owner and defendant, as contractor, to enforce his claim of
\$175, that on May 3, 1932, plaintiff, through his attorney, Fox,
paid to defendant, through his attorney, Fox, the sum of
\$175 "in full payment of all claims between plaintiff and defendant."

that on the last mentioned date Perz, as attorney for Gerwisch, signed and delivered to Landise, as attorney for Ricciardi, a stipulation and agreement stating that the pending mechanic's lien suit "be dismissed as to Ricciardi, - all matters and things having been settled and adjusted as between said Gerwisch and Ricciardi;" that plaintiffs had no knowledge of the making of the payment of \$120 by Ricciardi to Gerwisch or of the execution and delivery of the stipulation and agreement; and that on August 8, 1930, upon representations of Perz that he was proceeding with the prosecution of the mechanic's lien suit, that Ricciardi has refused to settle the same, and that the further prosecution thereof "would entail master's fees and additional costs to plaintiffs unless said suit was settled at once," plaintiffs "were induced to pay and did pay" to Gerwisch, through Perz, the sum of \$170, in full settlement of said suit. Accompanying the statement of claim is plaintiffs' affidavit of claim, showing a total demand, including interest, of \$177.79.

In defendant's amended affidavit of merits, sworn to by Perz, it is in substance admitted that there was a contract between plaintiffs, as owners, and Ricciardi, as contractor, for the completion of the porch on the premises; that defendant performed work thereon as a subcontractor; that defendant instituted the mechanic's lien suit; that thereafter he received the payment of \$120, and the stipulation and agreement then was entered into; and that thereafter plaintiffs paid to him, through Perz, the sum of \$170. But defendant denied that when the payment of \$120 was made to him plaintiffs did not have knowledge thereof; denied that plaintiffs' payment of \$170 was made "under a mistake of fact;" and denied that when it was made Perz made the representations to them as charged. And defendant alleged that the payment of \$170 "was in satisfaction of his lien claim and his said lien suit, and that in consideration of the payment he dismissed said suit."

Plaintiffs' theory upon the trial was in substance that because of the payment by Ricciardi to Gerwisch of \$120 on May 3, 1930, and of the stipulation and agreement then entered into, they were under no legal or equitable obligation to pay Gerwisch any money; that they had no knowledge of said payment or of the making of said stipulation and agreement; that if they had had such know-

ledge when they made their payment of \$170 to Gerwisch on August 8, 1930, they would not have made it; that it was made under a mistake of fact and because of the true facts being concealed from them at the time; and that, hence, they were entitled to recover back from Gerwisch said sum of \$170, together with legal interest.

The bill of exceptions does not disclose what testimony was introduced upon the trial, but there are contained therein certain findings of fact made by the court (which are in substantial accord with plaintiffs' theory) and the holding that plaintiffs' said payment of \$170 "was without consideration and should be returned." The testimony not appearing in the bill of exceptions, we must presume that said findings were sustained by the evidence. And under the findings it is clear to us that the judgment is not contrary to the law. (See, County of LaSalle v. Simmons, 5 Gilm. 513, 519; Chicago & Alton R. Co. v. Chicago, etc. Coal Co., 79 Ill. 121, 130; Prickett v. Madison, 14 Ill. App. 454, 464; Rees v. Schmits, 164 Ill. App. 250, 258; Pittsburgh Steel Co. v. Hollingshead, 202 Ill. App. 177, 180.) In the Prickett case (14 Ill. App. 454, 464) it is said:

"The principle to be deduced from these cases and the authorities cited in them seems to be that where by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interests, it is necessary to make payment of money, which indeed he does not owe and which in equity and good conscience the receiver ought not to retain, he may recover it, and so also when such a payment is made in ignorance of material facts which, if known, would have led him to refrain from making the payment."

It appears from the bill of exceptions that during the trial Gerwisch moved the court to dismiss the present suit on the ground that the matters herein involved "were formerly adjudicated" in said mechanic's lien suit (mentioned in the pleadings.) The motion was denied. Subsequently, after the judgment had been entered Gerwisch moved for the vacation of the judgment upon the same ground, and in

As time and money of the two sides being consumed from them as
soon, they would not have made it; that it was made under a mistake
also when they made their payment of \$100 to Government on August 31.

The bill of exceptions does not disclose that testimony was taken upon the issue of whether the defendant was sane at the time of the commission of the crime. The bill of exceptions does not disclose that the defendant was sane at the time of the commission of the crime. The bill of exceptions does not disclose that the defendant was sane at the time of the commission of the crime.

(1) The first of these is the fact that the United States is a democratic country. This is a fact which is well known to all people of all nations. It is a fact which is well known to all people of all nations. It is a fact which is well known to all people of all nations.

[illegible]

It appears from the bill of exceptions that during the trial Johnson moved the court to dismiss the present writ on the ground that it was a writ of habeas corpus "not lawfully obtained" in that Johnson's firm was (mentioned in the affidavit). The writ was denied. Subsequently after the judgment had been entered Johnson moved for the reversal of the judgment upon the new ground, and in

support of the motion offered in evidence certain documents relating to said lien suit. This motion also was denied. After reviewing the documents and considering the pleadings and the court's findings we think that the action of the court in denying both motions was proper.

The judgment of the municipal court of November 12, 1931, appealed from, should be and is affirmed.

AFFIRMED.

Kerner, P. J., and Scanlan, J., concur.

support of the motion which in evidence contains evidence relating
to said line work. This motion also was denied. That involving
the documents and concerning the planning and the work's planning
we think that the motion of the court in said line work was

denied.

The judgment of the master court of record in 1904

appealed from, should be set aside.

ORDER.

GRANT, J. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

35816

MARTIN L. H. BARCLAY,
Appellee,

v.

GOLDBERG DRUG COMPANY,
a corporation,
Appellant.

67 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 612¹

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in trover, commenced on July 11, 1930, there was a trial before a jury in November, 1931, resulting in a verdict against defendant for \$1,000, and on November 24, 1931, judgment was entered against defendant in that sum. Defendant appealed.

In plaintiff's statement of claim he alleged in substance that "on March 12, 1929," he was the owner of certain law books, theological books, desks, chairs, an iron safe, and other office furniture "of the value of \$1500;" that "being so possessed thereof" he on the same day casually lost the goods and the same came into defendant's possession by finding; that defendant, well knowing that the goods were plaintiff's property, refused upon written demand upon it (copy attached) to deliver them to plaintiff but converted them to its own use; and that thereby plaintiff has been damaged in the sum of \$1500.

The copy of the written demand, attached to said statement, is dated "July 7, 1930," addressed to "Goldberg Drug Company, a corporation, 3501 South State Street, Chicago," and signed in plaintiff's name, and therein plaintiff demands "immediate delivery of the following articles." Then follow an itemized list of numerous law-books and theological books, concluding with the words "and book

Handwritten marks and scribbles at the top of the page.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED

DATE 11-11-81 BY SP-10

EXEMPT FROM DISCLOSURE
DATE 11-11-81 BY SP-10

NO. 11-11-81

In a letter dated July 11, 1981, the writer advised that on July 11, 1981, there was a trial before a jury in November, 1981, regarding a vehicle against defendant and an individual. Defendant was advised of his rights in November 11, 1981. Defendant was advised of his rights in November 11, 1981. Defendant was advised of his rights in November 11, 1981.

In plaintiff's statement of claim he alleged in and to the effect that "on March 11, 1981, he was the owner of certain law books, theological books, books, charts, on law, and other office furniture at the time of the trial, that being so possessed thereof" he on the same day received from the books and the same were into defendant's possession by finding that defendant, well knowing that the books were plaintiff's property, retained them without having given it (copy attached) to plaintiff. It is plaintiff's contention that in the past and that plaintiff's property has been damaged in the sum of \$1000.

The copy of the written demand, attached to this affidavit, is dated July 11, 1981, addressed to "Colin A. Gannon, a corporation, 2221 North 1st Street, Chicago, Ill." and signed in plaintiff's name, and therein plaintiff demands "immediate delivery of the following articles." Then follow an itemized list of numerous law books and theological books, together with the words "and books

cases, safe, filing cabinet and files, 2 desks with glass tops, 8 chairs, typewriter, coat rack, and all valuable and priceless papers including stocks and bonds, and invaluable personal papers."

In defendant's affidavit of merits, sworn to by Sidney K. Goldberg, "the duly authorized agent of defendant and having knowledge of the facts," all allegations contained in plaintiff's statement are denied, and it is further denied that defendant "ever had under its control or in its possession" the books and chattels mentioned in said statement.

On the trial plaintiff was a witness in his own behalf and two witnesses testified for him. On defendant's behalf Sidney K. Goldberg, its president, testified, as did two other witnesses called by it. Certain writings were admitted in evidence. The following facts in substance appeared: Early in the year 1923, plaintiff, an attorney-at-law, was practicing his profession in Chicago, with office at 3108 South State street. He had in his office certain law books, theological books and office fixtures and equipment. About the middle of the year 1923, he ceased practicing in Chicago and went to Europe. Another attorney-at-law, Van G. De Suze, also occupied said office and when plaintiff left Chicago, he placed the books, fixtures and equipment in the care and custody of De Suze, who continued the practice of his profession in that office, using said books, etc., until the fall of 1926. He then moved to a new office on the second floor of the building known as No. 3501 South State street. Sidney K. Goldberg, individually, was the lessee of this building. The ground floor was occupied by the defendant, Goldberg Drug Company, for its business. Goldberg, individually, subleased said office on the second floor to De Suze, who took possession, bringing said books, etc. to the new office and using them, apparently as owner. For more than a year thereafter

cases, notes, filling cabinets and files, 2 chairs with glass tops, 2 chairs, typewriter, desk, book, and all valuable and precious papers including notes and books, and invaluable personal papers."

In defendant's affidavit of denial, sworn to by Sidney M. Goldberg, "the only authorized agent of defendant and having knowledge of the facts," all allegations contained in plaintiff's statement are denied, and it is further denied that defendant "ever had under its control or in its possession" the books and materials mentioned in said statement.

On the trial plaintiff was a witness in his own behalf and two witnesses testified for him. The defendant's denial being denied by its president, testified, on his own behalf, and two witnesses testified for it. Certain exhibits were admitted in evidence. The following facts in substance appeared: Early in the year 1935, plaintiff, an attorney-at-law, was practicing his profession in Chicago, with office at 3301 South State Street. He had in his office certain law books, magazines, notes and other materials and equipment. About the middle of the year 1935, he removed his office to Chicago and went to Chicago. Another attorney-at-law, Sam W. De Rube, also occupied said office and then plaintiff left Chicago. He placed the books, magazines and equipment in the care and custody of a firm, the defendant the firm of his partner in that office, using said books, etc., until the fall of 1935. He then moved to a new office on the second floor of the building known as No. 3301 South State Street. Sidney M. Goldberg, defendant, was the owner of this building. The ground floor was occupied by the defendant, Goldberg, for the business. Goldberg, defendant, said office on the second floor in the year 1935, took possession, bringing said books, etc., to the new office and

De Suze practiced in the new office and paid the stipulated monthly rent to Goldberg individually. Early in the year 1928, however, he fell behind in his rental payments and in March, 1928, he moved out and took away with Goldberg's consent the desks, chairs, iron safe, and most, if not all, of the office furniture and equipment. By agreement with Goldberg he left the law books and theological books with Goldberg as security for the payment at a future time of the rent due. Apparently, he did not thereafter pay to Goldberg any back rent and the books remained in Goldberg's individual possession. Plaintiff did not return to Chicago until the Spring of 1930, after an absence of nearly seven years. He testified in substance that early in April, 1930, he called on Goldberg, told him that he, and not De Suze, was the owner of the books, office equipment, etc., and demanded possession of the same; that Goldberg said that De Suze had taken away the furniture and equipment, but that he (Goldberg) still had possession of the books and that De Suze had left with him a list of the same, a copy of which he would give or mail to him (plaintiff); that a few days thereafter he received through the mail a copy of a list of books (same as attached to his statement of claim in the present suit); that Goldberg refused to deliver the books until a settlement as to the rent due from De Suze had been made; and that thereafter he (plaintiff) caused to be served on defendant the written demand for the books which, upon being refused, was followed by the institution of the present suit. Goldberg's version of this April, 1930, conversation is different. He testified in substance that plaintiff first asked him if he had in his possession "some books belonging to De Suze;" that upon his saying that he had possession of them as security for rent due and upon plaintiff asking if he would sell them, he (Goldberg) replied that he would not sell them without De Suze's permission, that if such permission was obtained he would

He then proceeded in the new office and held the registered monthly
rent of Goldberg individually. Early in the year 1938, however,
he fell behind in his rental payments and in March, 1938, he moved
out and took away with Goldberg's consent the books, chains, iron
saws, and most, if not all, of the office furniture and equipment.
By agreement with Goldberg he left the law books and specialized books
with Goldberg as security for the payment of a future time at the same
time. Apparently, he did not thereafter pay to Goldberg any back rent
and the books remained in Goldberg's individual possession. He stated
he did not return to Chicago until the Spring of 1939, after an absence
of nearly seven years. He testified in substance that early in April,
1939, he called on Goldberg, told him that he, and not he, was
the owner of the books, office equipment, etc., and demanded possession
of the same. Goldberg said that he had been taken away the law
books and equipment, but that he (Goldberg) still had possession of
the books and that he had been left with him a list of the same, a copy
of which he would give to him (plaintiff); that a few days
thereafter he received through the mail a copy of a list of books
which he attached to the statement of claim in the present suit;
that Goldberg refused to deliver the books until a settlement as to
the rent due from he had been made; and that thereafter he
(plaintiff) caused to be served on defendant the written demand for
the books which, upon being returned, was followed by the institution
of the present suit. Goldberg's version of this April, 1939, con-
versation is different. He testified in substance that plaintiff
first asked him if he had in his possession "some books belonging
to the group" that upon his saying that he had possession of them he
immediately for some time upon plaintiff calling at his home and

sell them for \$50, as they were of no use to him and were "old and office worn;" and that plaintiff replied he would advise him ^{further} later. Goldberg testified that at the time of the conversation he had, and has had since, the books stored away; that neither at that time nor at any time since has the Goldberg Drug Co. had possession of them; that said company is a corporation; that he is its president; and that the others interested in the company are his wife and brother (naming them) and a doctor, named Davis.

It appeared from defendant's evidence that on May 16, 1930, plaintiff commenced in the municipal court a replevin suit against the "Goldberg Drug Co., their agents and servants" to recover the possession of the books only. In the affidavit is set forth a list of books - the same as in the list given to him by Goldberg as aforesaid, and plaintiff alleged that he "is now lawfully entitled to the possession" of the same, that they "are of the value of \$200." and that "on March 12, 1929" the defendants "wrongfully took and now wrongfully detain" the same. From the bailiff's return on the replevin writ it appears that he served the writ "on Sidney E. Goldberg, agent of the Goldberg Drug Co., * * and demanded of him that he turn over all of the described property, which he as said agent failed and refused to do, and being unable to find the property, I return this writ unexecuted this May 19, 1930." It further appeared that subsequently plaintiff dismissed his replevin suit and commenced the present separate suit in trover.

Plaintiff was the only witness who testified as to his claimed ownership of the books. He did not call De Suse as a witness. He testified that in 1923 he had in his office in Chicago and then owned certain law and theological books, and that he is "the owner of those books and articles in that demand" (referring to the demand which he served upon defendant just prior to

well known fact that, as they were of no use to him and were "old
and office worn," and that plaintiff required no more copies of them
later. Defendant testified that at the time of the conversation
he had, and has had since, the books stored away that neither of
them had nor at any time since has the defendant ever had
possession of them; that said company is a corporation; that he is
the president and that the others interested in the company are
his wife and sister (naming them) and a sister named Davis.
It appeared from defendant's evidence that on May 1st
1930, plaintiff commenced in the municipal court a replevin suit
against the "Goldberg Trust Co." their agents and servants, to
recover the possession of the books only. In the affidavit in and
forth a list of books. The name of the list given to him by
Goldberg an attorney, and plaintiff alleged that he "is now law-
fully entitled to the possession" of the same, that they "are of
the value of \$200," and that "on March 1st, 1930" the defendant
"wrongfully took and now wrongfully detain" the same. From the
plaintiff's return on the replevin writ it appears that he served
the writ "on Edward E. Goldberg, agent of the Goldberg Trust Co.,
and demanded of him that he turn over all of the described
property, which he as said agent failed and refused to do, and
thereupon as then the property is certain this suit commenced
this day of May, 1930." In plaintiff's return and supporting affidavit
it appeared the replevin suit was returned for plaintiff's
benefit in 1930.

Plaintiff was the only witness who testified as to his
claimed ownership of the books. He did not call to him as a
witness. It appeared that in 1930 he had in his office in Chicago
and some other certain law and theological books, and that he is

commencing the present action.) He was allowed, over defendant's objection, to testify that the fair, cash value of the books alone was "about \$1250," and that the value of the books and the other articles mentioned in the demand "couldn't be less than \$1500." The objection to this testimony was in substance that he had not shown that he was qualified to testify to the value of second-hand books, etc., which were old and worn and which "he had not seen since 1923" - (i.e., for more than seven years.) On cross-examination he stated that his values given for the books were not based on their present market value, that as he had not seen them since his return to Chicago he did not know their present condition, and that he is "fixing the value as of the time I left them." And his attention having been directed to his replevin affidavit of May 16, 1930, wherein he swore that said books were "of the value of \$200," he further testified that he therein put that price on the books "so as to facilitate me in getting a cheap replevin bond." Defendant's witness, Robert C. Burger, a dealer in and an appraiser of second hand law and other books in Chicago for 11 years, testified that he had examined the list of books introduced in evidence and that, assuming that the books had been used by plaintiff in 1923 and prior thereto, and had since been used and also stored, the present fair market value of the entire list of books would not, in his opinion, exceed \$75.

Numerous grounds are urged by defendant's counsel for a reversal of the judgment. We shall only consider three. We are of the opinion (1) that the verdict under the evidence is so grossly excessive that it should not be allowed to stand; (2) that the evidence does not sufficiently show that the books and articles mentioned in plaintiff's statement of claim were ever in the possession of the defendant corporation or that it was guilty of converting them to its own use, as charged; and (3) that one of the given instructions,

[illegible]

No. 13, offered by plaintiff and objected to and which directed a verdict for plaintiff, is erroneous, in that elements necessary for such an instruction are lacking, that it tended to mislead the jury and that it is otherwise objectionable. It is as follows:

"No. 13. The court further instructs the jury that if the plaintiff has proven his ownership and the right of possession of the goods sued upon in this case by clear weight of evidence, and it has also appeared that the defendant wrongfully withheld such goods from the plaintiff, and that the plaintiff made demand upon the defendant for the return of such goods, which demand the defendant refused, and this defendant has, as a matter of law, admitted to have converted the goods to its own use, it is your duty and you should find the issues in this case in favor of the plaintiff and assess plaintiff's damages at the fair, cash, market value of the goods at the time of the conversion of the defendant."

The judgment of the municipal court of November 24, 1931, is reversed and the cause is remanded.

REVERSED AND REMANDED.

Kerner, P. J., and Scanlan, J., concur.

35550

EDWIN HAMILTON,
Appellant,

vs.

ESTELLE JENSEN,
Appellee.

687
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 612²

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff sued the defendant in the Municipal court of Chicago upon a judgment note for \$377.40 executed by the latter and made payable to the order of "Thomas F. Cline, doing business as Cline Heating Company." The statement of claim alleges that Cline sold and delivered the note to the plaintiff before maturity and for a valuable consideration and that plaintiff is the legal owner thereof. A judgment by confession for \$339.04 was entered. Thereafter, upon motion of the defendant, the judgment was opened and the defendant was given leave to make defense to the action, the judgment to stand as security. The case was tried before the court, with a jury, and there was a verdict returned finding the issues against the plaintiff. A motion for a new trial was overruled. Judgment was entered on the verdict and the judgment rendered against ^{defendant} by confession was vacated. This appeal followed.

The payee of the note, Thomas F. Cline, who was engaged in business as the Cline Heating Company, was an office associate of the plaintiff and was the principal witness for the plaintiff, who was an attorney at law. Cline indorsed the note to the plaintiff "without recourse." The consideration for the note was the installation of an oil burner in the home of the defendant by Cline, under a contract, which the plaintiff has not seen fit to abstract. Failure of consideration, a defense interposed, was clearly established by the proof, and the plaintiff does not argue that question. Plaintiff states in his brief that "the only question

1000

ROYAL MAILING
ASSOCIATES

75

ROYAL MAILING
ASSOCIATES

287 I.A. 612

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

The plaintiff sued the defendant in the Municipal Court of Chicago upon a judgment for \$250.00 rendered by the latter and made payable to the order of "Thomas F. Elise, Agent, Chicago Cline Heating Company." The judgment of the court was that Cline sold and delivered the note to the plaintiff before maturity and let a valuable consideration and that plaintiff is the legal owner thereof. A judgment by confession for \$250.00 was entered. Thereafter, upon motion of the defendant, the judgment was opened and the defendant was given leave to take defense to the action. The judgment is stated on record. The case was tried before the court, with a jury, and there was a verdict returned finding the defendant against the plaintiff. A motion for a new trial was overruled. Judgment was entered on the verdict and the judgment was affirmed by the appellate court. This appeal followed.

The cause of the case, Thomas F. Elise, was one engaged in business as the Cline Heating Company, was an active associate of the plaintiff and was the principal witness for the plaintiff, who was an attorney at law. Cline delivered the note to the plaintiff "without recourse." The consideration for the note was the installation of an oil burner in the home of the defendant by Cline, under a contract, when the plaintiff was not even 18 in age. Failure of installation, a return installment, was made up and delivered by the court, and the plaintiff does not argue that question. Plaintiff states in his brief that "the only question

in this case is whether there was any evidence from which the jury could find that plaintiff had notice of defenses, interposed by the defendant;" and, again, "Our view of the case is that plaintiff was a bona fide holder for value and that whether the heating apparatus worked properly was immaterial so far as plaintiff is concerned."

The plaintiff contends that "the burden is on the defendant to prove plaintiff is not a bona fide holder of the note sued upon for value." We may assume, for the purposes of this case, that this contention states a correct proposition of law, as we are satisfied, after a careful examination of the evidence, that the preponderance of the evidence shows that the plaintiff was not a holder in due course of the note.

The plaintiff contends that the "defendant having, by her conduct, led plaintiff to believe the note was free from any defenses, is now estopped to assert any defense to said note as against plaintiff." We find no merit in this contention.

The judgment of the Municipal court of Chicago is a just one and it should be and it is affirmed.

AFFIRMED.

Kerner, P. J., and Gridley, J., concur.

[illegible]

of the evidence shows that the Plaintiff was not a holder in due course of the note.

The district conference last June "definitely" advised, by letter, the district to discontinue the sale of the "Chicago" in the district. It was also stated that the district was not authorized to accept any further orders for the "Chicago" in the district. The district was also advised that the district was not authorized to accept any further orders for the "Chicago" in the district. The district was also advised that the district was not authorized to accept any further orders for the "Chicago" in the district.

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EDWARD H. OLSEN,
Appellee,

v.

MARYA ZOLNIEWSKI, WOJCIECH
WOJCISCHOWSKI, JOHN R.
PARZYK et al.,
Defendants.

MARYA ZOLNIEWSKI,
Appellant.

69 7
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

267 I.A. 612³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This was a bill to foreclose a junior trust deed to secure a note for \$300 on certain real estate. The cause was referred to a master, who filed a report finding the equities with the complainant and recommending a foreclosure. The chancellor overruled exceptions to the report and entered a decree of foreclosure. The defendant Marya Zolniewski appeals.

The master found that about 1913 the defendant Marya Zolniewski and John Parzyk "began living together as husband and wife, although not married, and that said Marya Zolniewski from that time until on or about January, 1929 continued to live with said John Parzyk and was known as Mary Parzyk; * * * that during that period the said defendant Marya Zolniewski used the name of Mary Parzyk in making conveyances of real estate and affidavits of various kinds, and that on December 2, 1922, the property known as 2250 Milwaukee Avenue was conveyed to the defendant Marya Zolniewski as Mary Parzyk by warranty deed * * * subject to a trust deed to the Northwestern Trust and Savings Bank, dated June 17, 1922; * * * that on the 12th day of January, 1924, a

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1. *Amphiprion melanopus* (Forsk.)

... This was a bill to introduce a Junior Trust deed to
secure a note for \$500 on certain real estate. The same was
referred to a member, who filed a report finding the equities with
the complainant and recommending a foreclosure. The Chancellor
exercised discretion as to the report and entered a decree of fore-

The master found that about 1913 the defendant Marya Jaislowksi and John Jaisky began living together as husband and wife, although not married. A son was born Jaisky Jaislowksi from that time until on or about January, 1922 continued to live with said John Jaisky and was known as John Jaisky. At that time during that period the said defendant Marya Jaislowksi used the name of Mary Jaisky in making purchases of food and other necessities.

conveyance of the property in question was made from Mary Parzyk and John Parzyk, her husband, to the defendant Marya Zolniewski, and that said deed was filed for record; * * * that said conveyance was a conveyance by the defendant under the name of Mary Parzyk to herself under the name of Marya Zolniewski; * * * that on June 15, 1926, the defendant Marya Zolniewski, under the name of Mary Parzyk, negotiated a loan with one L. P. Paulson upon the said above described premises, and that at the execution of the trust deed for said loan on June 15, 1926, the defendant authorized and directed one Anna Wojciechowski to sign the name of Marya Zolniewski to said trust deed and to the notes secured by same; * * * that the proceeds of the loan * * * were paid by check payable to Mary Parzyk, which said check was endorsed by the defendant Marya Zolniewski with the name of Mary Parzyk; * * * that on July 12, 1927 the defendant Marya Zolniewski, under the name of Mary Parzyk, negotiated a loan with the Security Bank of Chicago, and again requested Anna Wojciechowski, whose married name at that time was Anna Peplies, to execute the mortgage and sign the name of Marya Zolniewski to the trust deed and notes aggregating the sum of \$7,000 in the name of Marya Zolniewski; * * * that in the fall of 1927 the defendant Marya Zolniewski, under the name of Mary Parzyk, and John Parzyk, as the owners of the property known as 2250 Milwaukee Avenue, attempted to negotiate a loan with Mr. Mach and Mr. Stermer for the sum of \$1,000, and that thereafter Mr. Mach informed her that the loan would be made for the sum of \$300, and that the defendant Marya Zolniewski, under the name of Mary Parzyk, told Mr. Mach and Mr. Stermer that the said property belonged to her and her husband, but that the title was held in the name of Marya Zolniewski; * * * that at the direction of the defendant Marya Zolniewski, Anna Peplies executed the note

consequence of the property in question was made from Mary Mary
and John Mary, her husband, to the defendant Mary Mary Mary,
and that said deed was filed for record; * * * that said conveyance
was a conveyance by the defendant under the name of Mary Mary to
herself under the name of Mary Mary; * * * that on June 15,
1933, the defendant Mary Mary, under the name of Mary Mary,
negotiated a loan with one E. F. Johnson upon the said above described
premises, and that at the execution of the same deed for said loan
on June 15, 1933, the defendant authorized and directed one John
Mary to sign the name of Mary Mary to said deed
and is the same signed by said * * * that the purpose of the
loan * * * was paid by check payable to Mary Mary, which said
check was cashed by the defendant Mary Mary with the sum of
Mary Mary; * * * that on July 15, 1933, the defendant Mary
Mary, under the name of Mary Mary, negotiated a loan with
the Security Bank of Chicago, and again requested John Mary Mary,
whose married name at that time was Mary Mary, to execute the
same and sign the name of Mary Mary to the deed and
said mortgage for the sum of \$1,000 in the name of Mary Mary;
* * * that on the 15th of July 1933, the defendant Mary Mary, under
the name of Mary Mary, and John Mary, as the grantor of the
property known as 2230 Milwaukee Avenue, assigned to negotiate
a loan with Mr. Mack and Mr. Johnson for the sum of \$1,000, and that
thereafter Mr. Mack informed her that the loan would be made for the
sum of \$500, and that the defendant Mary Mary, under the
name of Mary Mary, told Mr. Mack and Mr. Johnson that the said
property belonged to her and her husband, but that the title was
in the name of Mary Mary; * * * that on the 15th of July
the defendant Mary Mary, under the name of Mary Mary, requested the name

and trust deed in the name of Marya Solniewski, and that pursuant to authority given by Marya Solniewski the amount of the loan was paid by Peter P. Stermer to John Parzyk; * * * that on or about April 24, 1928 Marya Solniewski authorized and directed Anna Peplies to make and execute in her name, that is to say the name of Marya Solniewski, a principal promissory note for the sum of \$800, bearing date the 24th day of April, 1928, due one year after its date, payable to the order of herself, with interest at the rate of six per cent per annum, * * * which said note was duly endorsed and delivered to Mr. Stermer and by him duly delivered to the complainant herein; * * * that on the same day, to secure the payment of said principal promissory note for the sum of \$800 and the interest thereon, the said Marya Solniewski authorized and directed Anna Peplies to make, execute and deliver to Edward H. Olsen, as Trustee, trust deed bearing date the 24th day of April, 1928, upon the following described real estate, situated in the City of Chicago, * * * (Here follows a description of the real estate in question.) * * * that said loan of \$800 was consummated on or about April 24, 1928; that Anna Peplies executed the principal promissory note at the direction of Marya Solniewski, and that said Marya Solniewski, under the name of Mary Parzyk, notified Frank Mach by telephone that she would send the same woman who had signed the name of Marya Solniewski to the other notes and mortgages, to the office of Frank Mach and Peter P. Stermer to execute the papers for the \$800 loan; and further informed Mr. Mach that Mr. Parzyk would be with the same woman and that anything Mr. Parzyk did would be all right with her, the said Mary Parzyk, and that said Mr. Parzyk had as much right and interest in the matter as she had, and that she would send Mr. Parzyk, her husband, with the woman and that he would identify her and introduce her to

Mr. Mach; * * * that said Frank Mach and Peter F. Sterner, in good faith, relied upon the statements made to them by said Marya Zolniewski and accepted the execution of said notes and trust deed by Anna Peplies, believing in good faith that said Anna Peplies was in truth Marya Zolniewski, who held title to the property; * * * that said loan and execution of said notes and trust deeds were made for the benefit of said Marya Zolniewski and John Parzyk; * * * that within two or three days after the execution of said trust deed and note and the payment of the money for which the same were given, Marya Zolniewski called at the office of Frank Mach and asked whether or not the proceeds of the loan had been paid, and that upon being informed that payment had been made, she complained to Frank Mach that half of the money should have been paid to her and said that her husband (meaning John Parzyk) had not used the money to pay the taxes and interest, as he had promised, but had used it for some other woman; and that at that time the said Marya Zolniewski made no objection or complaint to the execution of said trust deed and note by said Anna Peplies." The master further found, "as a matter of law, by reason of her acts and representations the said Marya Zolniewski is estopped from denying that said Anna Peplies was her agent, and is also estopped from questioning the authority of said Anna Peplies to execute the notes and trust deed in question; and is further estopped from invoking the defense of the Statute of Frauds in this cause, and further estopped from denying the validity of said notes and trust deed."

The complainant's theory is, "that the defendant, Marya Zolniewski, represented to Frank Mach and Peter Sterner, through whom the complainant purchased the note and trust deed in question, that Anna Peplies was, at the time the said note and trust deed were signed, Marya Zolniewski, the owner of the property, and that

Mr. Walsh: * * * that said Frank Walsh and Peter J. O'Sullivan, in good faith, relied upon the statements made to them by said Marya Kelnowski and accepted the execution of said notes and funds were made by said Marya Kelnowski, believing in good faith that said Marya Kelnowski was in truth Marya Kelnowski, who holds title to the property; * * *

That said loan and execution of said notes and funds were made for the benefit of said Marya Kelnowski and John Kelnowski; * * * that within two or three days after the execution of said funds were made and the payment of the money for which the same were given, Marya Kelnowski called at the office of Frank Walsh and asked whether or not the proceeds of the loan had been paid, and that upon being informed that payment had been made, she complained to Frank Walsh that half of the money should have been paid to her and said that her husband (meaning John Kelnowski) had not used the money to pay the taxes and interest, as he had promised, but used it for some other woman; and that at that time the said Marya Kelnowski made no objection or complaint to the execution of said funds and notes by said Marya Kelnowski. The master further found, "as a matter of fact, by reason of her acts and representations the said Marya Kelnowski is estopped from denying that said Marya Kelnowski was her agent, and is also estopped from questioning the authority of said Marya Kelnowski to execute the notes and funds loan in question; and is further estopped from questioning the validity of the receipt of funds on this issue, and likewise estopped from denying the validity of said notes and funds loan."

The complainant's theory is that the defendant, Marya Kelnowski, represented to Frank Walsh and Peter O'Sullivan, that when the complainant purchased the notes and funds were in question, that said Marya Kelnowski was at that time the wife and agent of said John Kelnowski, who was at that time the owner of the property, and that

Mach and Stermer believed and relied upon the representations of said defendant, in consequence of which the said note and trust deed were purchased and the proceeds of the loan paid out; that the fact that the defendant procured Anna Peplies to execute two mortgages on said property in the defendant's name on previous occasions clearly shows that a scheme of deception was employed by the defendant in procuring loans on said property and that the loan in question was procured by the same scheme; that the defendant expressly directed Anna Peplies to execute the note and trust deed now under consideration, and expressly directed Mach and Stermer to consummate the loan with her supposed husband, John Parzyk, and even though the defendant now contends otherwise, she cannot deny the apparent authority with which she clothed them; that the defendant was concerting in a conspiracy, the purpose of which was to secure a loan on this property by falsely holding out Anna Peplies to be the owner, and whether defendant denies the authority of said Anna Peplies or not, she had full knowledge that Anna Peplies was about to, and did, sign the defendant's name to the note and trust deed, and is thereby precluded from relief in a Court of Equity; and that said defendant cannot now invoke the provisions of the Statute of Frauds to further her own fraudulent conduct."

The appellant's theory of the case is, "that she did not sign the note or trust deed or acknowledge the same; that she had no knowledge of the execution of the note or trust deed or the acknowledgment thereof, or the delivery of the said notes and trust deed to the said Stermer or the said Olsen; that the note and trust deed and acknowledgment are not her note, trust deed, or acknowledgment, and that she did not know of the existence of the note or trust deed until after the suit to foreclose had been started; that she did not authorize the said Anna Peplies to execute said note or trust deed or acknowledge the same or to deliver the same;

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that under the Statute of Frauds, which was pleaded, any authorisation of the execution of the said trust deed was required to be in writing and that the same is not evidenced in writing, and that the said note and trust deed are void; that the said Stermer and the said Olsen took the said note and trust deed subject to any imperfections or defenses of this defendant thereto."

The appellant contends "the manifest weight of the evidence does not sustain the authority of Anna Peplies to execute the note and trust deed, or of John Parzyk to receive the proceeds of the loan."

The evidence shows that about sixteen years ago the appellant began living with the defendant John Parzyk and she continued to live with him until about January, 1929. During all that time she represented herself to be Mary Parzyk, the wife of Parzyk, and she was never known or described as Marya Kolniewski, nor as a single woman. During that period Parzyk and the appellant, under the name of Mary Parzyk, engaged in a number of transactions involving the title to the real estate in question and other real estate, in all of which she held herself out as the wife of Parzyk, and in which she made many affidavits to the effect that her name was Mary Parzyk and that she was the wife of Parzyk. Title to the property in question was conveyed to her as Mary Parzyk, on December 2, 1922. On January 12, 1924, she, as Mary Parzyk, and Parzyk, "her husband," conveyed the property by quit claim deed to the appellant under her true name, Marya Kolniewski, in order to avoid the lien of certain threatened judgments against Parzyk. On June 15, 1926, she and Parzyk, as her husband, procured a loan of \$2,000 on the property through one L. P. Paulson, a real estate broker. Paulson had known the appellant and Parzyk for fourteen

that under the terms of the will, which was signed, any property
in the execution of the will being such was required to
be in writing and that the same is not void in writing, and
that the said will and trust deed are void; that the said
and the said will and the said trust deed were signed to
any objections in reference to this document.

The appellant contends "the manifest weight of the evi-
dence does not sustain the validity of said will in whole
the will and trust deed, as of John T. Tarkenton to receive the proceeds
of the same."

The evidence shows that about sixteen years ago the
appellant began living with his late wife, John Tarkenton, and the
deceased to live with him until about January, 1922. During all
that time she resided herself to be Mary Tarkenton, the wife of
John Tarkenton, and she was never known or described as Mary Tarkenton,
and as such was known.

Under the will of John Tarkenton, which is a copy of the same
involving the title to the real estate in question and other real
estate, in all of which she held herself out as the wife of John Tarkenton,
and in which she made many references to the estate of John Tarkenton,
and Mary Tarkenton and that she was the wife of John Tarkenton. This is the
property in question was conveyed to her as Mary Tarkenton, on

December 2, 1902. On January 12, 1922, she, as Mary Tarkenton, and
John Tarkenton, conveyed the property in question to the appellant
and appellant's sons, John Tarkenton, Mary Tarkenton, in which it
was the law of the State of Tennessee, and the appellant, appellant's sons,
and John Tarkenton, and Mary Tarkenton, in which it was the law of the State
of Tennessee, and the property thereof was J. T. Tarkenton, a real estate
agent, and the appellant and Mary Tarkenton.

or fifteen years prior to that time, and had always known her as the wife of Parzyk. The loan was evidenced by notes secured by a trust deed on the property. To avoid revealing her true name, the appellant brought to Paulson's office Anna Wojciechowski (who since that time has married and whose name is now Anna Peplies) and introduced her to Paulson as Marya Zolniewski, and Parzyk, who was also present, and the appellant told Paulson that Anna Wojciechowski held the legal title to the property. The notes and trust deed were signed at Paulson's office by Anna Peplies as "Marya Zolniewski." Anna Peplies and the appellant had been friends for many years, and the former stated that she signed the name as a favor to the appellant and at her request, that the appellant stood at her shoulder in Paulson's office and whispered to her to "sign Marya Zolniewski," and that when Paulson handed her the papers she did so sign them at the direction and request of the appellant. Paulson paid the loan by check, payable to Mary Parayk, which the appellant indorsed in his presence and she then had the check certified and later cashed. On July 12, 1927, the appellant, under the name of Mary Parzyk, negotiated another loan with the Security Bank of Chicago and again requested Anna Wojciechowski, whose name at that time was Anna Peplies, to sign the name Marya Zolniewski to the trust deed and notes aggregating the sum of \$7,000. In the spring prior to the making of that loan the appellant went to the home of Anna Peplies and asked her to sign the mortgage and notes, but Anna Peplies "was then expecting a baby," and as Marya Zolniewski was supposed to be a single woman the appellant decided that they must wait until after the birth of the child, which occurred shortly thereafter. In July, 1927, the appellant again requested Mrs. Peplies to sign the mortgage and notes, which she did on July 12. The appellant was not present

or fifteen years prior to that time, and had always known her as the wife of Janek. The loan was evidenced by notes secured by trust deed on the property. To avoid revealing her true name, the appellant brought to Janek's office (now deceased) who since that time has married and whose name is now Anna (Janek) and introduced her to Janek as Marie Kojaczewski, and Janek, who was also present, and the appellant told Janek that Anna Kojaczewski held the legal title to the property. The notes and trust deed were signed at Janek's office by Anna Kojaczewski and "Marie Kojaczewski." Anna Kojaczewski and the appellant had been friends for many years, and Janek stated that she signed the same as a favor to the appellant and at her request. That the appellant stood at her shoulder in Janek's office and witnessed her sign the "Marie Kojaczewski," and that when Janek asked her the papers she did so sign them at the direction and request of the appellant. Janek said the loan of money payable to Janek, which the appellant introduced in his presence and the bank and the check certified and later cashed. On July 12, 1937, the appellant, under the name of Marie Kojaczewski, notified Janek with the Security Bank of Chicago and again requested Anna Kojaczewski, whose name at that time was Anna Kojaczewski, to sign the name Marie Kojaczewski to the trust deed and notes evidencing the sum of \$7,000. In the period prior to the making of said loan the appellant went to the home of Anna Kojaczewski and asked her to sign the mortgage and notes, but Anna Kojaczewski was then expecting a baby, and as Marie Kojaczewski was supposed to be a single woman the appellant feared that they would not until after the birth of the child, which occurred shortly thereafter. In July, 1937, the appellant again requested Anna Kojaczewski to sign the mortgage and

at the signing of these instruments. Parzyk took Mrs. Peplics to the bank. After the signing of the papers Mrs. Peplics and Parzyk went back to the Parzyk house and there Mrs. Peplics asked the appellant if she did right to sign the papers as the appellant was not present, to which the appellant replied that it was all right, that "his word is just as good as my word." Prior to the time of the signing of these papers the appellant told Mrs. Peplics to be sure and take off her marriage ring before she went to the bank, as Marya Zolniewski was known there as a single woman. After the signing of the \$7,000 mortgage the appellant stated to Mrs. Peplics that she would later call upon her to sign other mortgage papers. In the fall of 1927 the appellant and Parzyk, as husband and wife, went to the office of Peter Stermer, a real estate broker, and requested a loan of \$1,000 upon the property in question. Frank Mach, a lawyer, had offices with Stermer and represented the latter in his real estate transactions. Mach had known the appellant and Parzyk for many years and had taken part in many transactions that involved the title to their real estate, and he had always supposed them to be husband and wife and had never suspected that the woman he knew as Mary Parzyk was in fact Marya Zolniewski. The appellant, during a period of about fifteen years, had acknowledged affidavits and deeds before him as Mary Parzyk, the wife of Parzyk. The appellant had previously told Mach and Stermer that the record owner of the property, Marya Zolniewski, was her niece. Nothing resulted from the first negotiations, but four or five months later negotiations were renewed and Stermer agreed to loan \$800 upon the property. The appellant asked Mach if she should sign the papers and Mach told her that the woman who held the record title must sign them, to which the appellant responded, "I will send my husband with the woman," and later Parzyk appeared at Stermer's office

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with Mrs. Peplies. Parzyk stated to Stermer and Mach: "This is the lady that will sign the loan, that my wife told you over the wire;" that she was the same woman who signed the mortgage at Paulson's office and the one at the Second Security Bank; that "she holds title for me." Mrs. Peplies, pursuant to the appellant's request, then signed the note and trust deed in the name of Marya Kelniewski. Stermer paid the amount of the loan to Parzyk, the money for the same having been advanced to the former by the complainant. About ten days or two weeks after the signing of the papers, the appellant appeared at Stermer's office and inquired of Mach if the loan had been paid, to which Mach responded that it had been paid to Parzyk pursuant to her direction. The appellant then stated that she should have received half of the money, that her husband had not used the money to pay interest and insurance but had used it for some other woman; that she should have been present when Mrs. Peplies signed the papers, the same as she was at the Second Security Bank matter; that they had no business to pay out the money as she was not present; that "you had no business to pay out the money without me," to which Mach replied, "You told me to pay the money out to whoever your husband says." On this occasion the appellant made no complaint as to the execution of the note and mortgage by Mrs. Peplies. Mach further testified that after the instant mortgage was in arrears the appellant applied to him for another loan to pay the instant one and that he told her, after a conference with Stermer, that they would make no more loans to her until she became reconciled with her husband, that they did not care to have any more trouble on account of the marital differences between the appellant and Parzyk; that at this interview the appellant did not in any way question the validity of the signatures to the trust deed and note. Parzyk did

with Mrs. Tephlin. Tephlin stated to Stewart and Nelson "This is the lady that will sign the loan, that my wife told you over the wire;" that she was the same woman who signed the mortgage at Penikese's office and the one at the Second Security Bank; that "the holder of the loan is Mrs. Tephlin, Penikese is the appellant's request, then signed the note and trust deed in the name of Henry Tephlin. Stewart paid the amount of the loan to Tephlin, the money for the same having been advanced to the latter by the complainant. About ten days or two weeks after the signing of the papers, the appellant appeared at Stewart's office and informed on March 17 the loan had been paid, to which which responded that it had been paid in Tephlin's name in her discretion. The appellant then stated that she should have received half of the money, that her husband had not used the money to pay interest and insurance but had used it for some other account that she should have been provided that Mrs. Tephlin signed the papers, the same as the one at the Second Security Bank. Tephlin that they had no business to pay and the money as she was not present; that "you had no business to pay out the money without", to which which replied, "You said me to pay the money out to answer your husband says." On this occasion the appellant made no objection as to the execution of the note and mortgage by Mrs. Tephlin. Tephlin testified that after the instant mortgage was in answer the appellant applied to her for money to pay the interest on and that he told her, after a conference with Stewart, that they would make no more loans to her until she became reconciled with her husband, that they did not want to have any more trouble on account of the marital differences between the appellant and Tephlin; that in this instance the appellant did not in any way question the validity of the signature on the instant loan and note. Tephlin did

not testify in the case. While the appellant testified that she did not authorize Anna Peplies to sign the note and trust deed in question, we are satisfied, after a very careful consideration of all the facts and circumstances in the case, that the master was justified in finding that the note and trust deed in question were executed by the authority and direction of the appellant and that the loan was paid to Parzyk at her direction. From a mere reading of the appellant's testimony it is difficult to determine her position in respect to the \$2,000 and \$7,000 mortgages. In certain answers she states that she did not authorize Anna Peplies nor any other person to execute these mortgages or any papers. In other answers she states that she did not sign the \$2,000 nor the \$7,000 mortgage and that she does not know who did sign them. In still other answers she states that she does not remember if she signed them. She also states that she never signed the name Marya Zolniewski to any paper after she took the name of Marya Parzyk. She contradicts in toto the testimony of Paulson, Stermer, Mach and Mrs. Peplies. While she denies that she authorized Anna Peplies to execute the \$2,000 and \$7,000 mortgages, and apparently repudiates these two instruments, nevertheless, she admits that she made payments upon both of them. She concedes that she and Parzyk placed the title to the property in the name of Marya Zolniewski, a single woman, and as Paulson, Stermer and Mach knew her as Mary Parzyk, a married woman, it was necessary for Parzyk and the appellant, when they wished to borrow money on the property, to have someone, other than the appellant, pose as Marya Zolniewski. There is much force in the contention of the complainant that the present position of the appellant is an afterthought that was born of her troubles with Parzyk.

The appellant contends that "the execution of the trust deed by Anna Peplies as the agent of Marya Zolniewski is void

not testify in the case. While the appellant testified that she did not authorize Anna Kojala to sign the note and transfer in question, we are satisfied, after a very careful consideration of all the facts and circumstances in the case, that the matter was settled in finding that the note and first bond in question were executed by the authenticity and direction of the appellant and that she loaned the money to Kojala as her direction. From a mere reading of the appellant's testimony it is difficult to determine her position in respect to the \$2,000 and \$7,000 mortgages. In certain respects she stated that she did not authorize Anna Kojala nor any other person to execute these mortgages of any kind. It also appears that she did not sign the \$2,000 mortgage and that she does not know who did sign them. In still other matters she stated that she does not remember if she signed them. The also stated that she never signed the same being authorized to sign papers after she took the name of Henry Kojala. The commission in fact the testimony of Hamilton, Stewart, Koch and Mrs. Kojala. While she admits that she authorized Anna Kojala to execute the \$2,000 and \$7,000 mortgages, and apparently registered them for recording, the commission also states that she was not aware of the fact that the appellant was and always placed the title to the property in the name of Henry Kojala, a single woman, and as Hamilton, Stewart and Koch know that Henry Kojala, a married woman, it was necessary for Kojala and the appellant, when they wished to borrow money on the property, to have someone other than the appellant, such as Henry Kojala. There is much force in the contention that the commission that the present position of the appellant is in effect that she was not aware of the fact that Kojala was not the owner of the property. The appellant admits that the execution of the first

under the Statute of Frauds, not having been in writing." It is the settled law of this state that "courts of equity will not permit the Statute of Frauds, designed to prevent fraud, to be made an engine of fraud." Certain cases cited by the appellant in support of the instant contention state the general rule that the defense of the Statute of Frauds to a suit upon a contract for the conveyance of an interest in real estate is good, in the absence of any question of estoppel. As we read and understand this record, the appellant is estopped, by her conduct, from invoking the Statute of Frauds.

The appellant also contends that "the decree does not follow the case made by the bill as amended." The appellant argues that the allegations of the bill as amended are not supported by the evidence and for that reason the decree should be reversed. We have endeavored to follow the rather strained argument in support of this contention, and after a consideration of the same we find no merit in it. The bill, as amended, alleges that the appellant "caused to be made and delivered in her name" (meaning the name Marya Bolniewski) the note and trust deed in question, and that "Marya Bolniewski executed and delivered, or caused to be executed and delivered in her name," the said note and trust deed, and that she "caused to be executed in her name" and that she "conveyed and warranted" or "caused to be conveyed and warranted" said note and trust deed. The evidence supports these allegations of the bill. It will be noted that several of the allegations are in the disjunctive.

The appellant has had a fair trial and the decree of the Superior court of Cook county should be and it is affirmed.

AFFIRMED.

Kerner, P. J., and Gridley, J., concur.

under the statute of Wisconsin, not having been in existence." It is
the entire law of this state that "every person who is guilty of
the crime of murder, is liable to be punished, to be made an
engine of terror." Certain cases cited by the appellant in support
of the instant conviction state the general rule that the evidence
of the State of Wisconsin to a suit upon a contract for the conveyance
of an interest in real estate is good, in the absence of any question
of fraud. We are not and understand this record, the appellant
is satisfied, by her conduct, from involving the State of Wisconsin.
The appellant also contends that "the record does not
show the case made by the bill as amended." The appellant
argues that the allegations of the bill as amended are not supported
by the evidence and that the bill as amended is defective.
We have endeavored to follow the former amended statement in support
of this contention, and after a consideration of the same we find no
merit in it. The bill, as amended, alleges that the respondent
caused to be made and delivered in her name "certain the name
Alexy Kohniewicz" the note and trust deed in question, and that
Alexy Kohniewicz executed and delivered, or caused to be executed
and delivered in her name, "the said note and trust deed, and that
the "caused to be executed in her name" and that she "conveyed and
caused to be conveyed and warranted" said note and
trust deed. The evidence supports these allegations of the bill.
It will be noted that several of the allegations are in the dis-
positive.
The appellant has had a fair trial and the decree of the
lower court of such court should be and is affirmed.
AFFIRMED.

35602

ELLICH McNEIL and BERTHA
McNEIL, alias MR. and MRS.
ELLICH McNEAL,

Appellees,

v.

THE DREXEL STATE BANK OF
CHICAGO, a corporation,
Appellant.

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APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 612⁴

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

Ellich McNeil and Bertha McNeil, alias Mr. and Mrs.

Ellich McNeal, plaintiffs, sued the Drexel State Bank of Chicago, a corporation, defendant, in the Municipal court of Chicago in an action of the first class. There was a trial before the court, with a jury, and a verdict returned finding the issues in favor of the plaintiffs and assessing their damages at the sum of \$1,500, "with three per cent accrued interest." A motion for a new trial was overruled and judgment was entered in the sum of \$1,500. This appeal followed.

On January 9, 1931, an order was entered giving the plaintiffs leave to file an amended statement of claim and ruling the defendant to file an amended affidavit of merits to the amended statement of claim, and an amended statement of claim was thereafter filed, which is, in so far as it is pertinent to the only item in the statement of claim allowed by the jury, as follows:

"The plaintiffs allege that the defendant * * * is indebted to them in the sum of Two Thousand Four Hundred and Five Dollars, and interest thereon, was deposited by plaintiffs and received by defendant for the use of plaintiffs, on and prior to December 31, 1919, * * * that as evidence of the money so deposited by plaintiffs and received by defendant for the use of plaintiffs, the defendant delivered to plaintiffs a book, commonly called a bank book which was the depositor's account book, * * * No. 54547 and

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represented the account of Mr. and Mrs. Ellich McNeal. A copy of said book is hereto attached and made a part of this Statement of Claim.

"The plaintiffs further allege that they made their first deposit of One Thousand Dollars in United States currency to a teller, the then agent of the defendant, on May 9, 1919, who made out the aforesaid account book and made entry therein of the said One Thousand Dollars. Plaintiffs further aver that they advised the cashier of defendant bank and its teller that they did not read or write the English language or any other language. That the teller made and filled in a blank called a deposit slip for the deposit of the aforesaid One Thousand Dollars.

(Here follow allegations as to a number of deposits made by plaintiffs and that each of such deposits was entered by the teller in the account book in a less amount than was actually deposited.)

"The aforesaid entries into the aforesaid account book of ~~and~~ plaintiffs were made by the defendant and its then agent falsely, fraudulently, wrongfully and intentionally with full knowledge of the defendant and its agents that plaintiffs could not read the entries after they were entered and for the express purpose of defrauding the plaintiffs of the money they were depositing in the defendant's bank.

"Plaintiffs further allege that on December 31, 1919, they went to the defendant's bank and deposited with the defendant Two Hundred Dollars in cash with the then agent of the defendant, who entered to the credit of the plaintiffs, and while he had possession of the aforesaid bank book or account book of plaintiffs, he made an entry of a withdrawal of Fifteen Hundred Dollars, the said entry being made without the knowledge or consent of the plaintiffs, and without paying to the plaintiffs any money whatever, nor has the said Fifteen Hundred Dollars or any part of it ever been paid to the plaintiffs, and the defendant refused and still does refuse to pay the same or any part of it to these plaintiffs. (Italics ours.)"

"The plaintiffs further aver that they opened their said account with the Drexel State Bank on May 9, 1919; that they made deposits at regular intervals from that date down to and including January 9th, 1922. That upon January 9, 1922, plaintiffs delivered their deposit or bank book to one of the agents of the said bank for the purpose of having their accrued interest entered to their credit, whereupon the bookkeeper advised of the aforesaid entry of a withdrawal of Fifteen Hundred Dollars, on December 31, 1919, which was the first knowledge these plaintiffs had of the aforesaid entry; * * * that defendant paid interest at the legal rate allowed state banks on the aforesaid Fifteen Hundred Dollars during the years 1919, 1920 and 1921, but refused thereafter to pay aforesaid interest; * * * that after making all the said deposits into the defendant's bank, all of said money was left in the said bank until January 18, 1923, when all money on deposit in the said bank was withdrawn except that portion of the account claimed in this Statement of Claim, whereupon when the aforesaid account book of the plaintiffs was presented to the said defendant for the aforesaid withdrawal on January 18, 1923, the said defendant did then and there mark the aforesaid book cancelled; * * * that there is now due and owing to them accrued interest in the amount of Two Thousand One Hundred and Seventy-four

Dollars on the whole amount of the Two Thousand Four Hundred and Five Dollars, which interest began from January 1, 1919, up to and including the date of filing this Amended Statement of Claim; * * * yet, the defendant, though requested, has not paid to the plaintiffs the said sum of Two Thousand Four Hundred and Five Dollars or any part thereof nor has the aforesaid defendant paid the interest or any part thereon which has accrued on the aforesaid Two Thousand Four Hundred and Five Dollars, * * * to the damage of the plaintiffs in the sum of Four Thousand Five Hundred and Seventy-nine Dollars * * *."

Attached to the statement of claim is an affidavit of plaintiffs' claim. The defendant filed an "Additional and Amended Affidavit of Merits," which is, in so far as it is pertinent to the only item allowed by the jury, as follows:

"Affiant denies that defendant is indebted to the plaintiff in the sum of Two Thousand Four Hundred and Five Dollars, and interest thereon or any sum whatsoever; * * * admits that the plaintiffs were given a pass book numbered 54847 on December 31, 1919; * * * denies that plaintiffs made a deposit of One Thousand Dollars on May 9, 1919, and that on that date an entry was made in said pass book by a then agent of the defendant of the said One Thousand Dollars; * * * denies that plaintiffs advised the cashier of the defendant bank that they did not read or write the English language or any other language; * * * denies that the teller made and filled in a blank called a deposit slip for the deposit of the aforesaid One Thousand Dollars on May 9, 1919; * * * denies that said entries on the aforesaid account book of the plaintiffs were made by the defendant and its then agent falsely, fraudulently, wrongfully or intentionally or with full knowledge of the defendant or its agents, that plaintiffs could not read the entries after they were entered or for the expressed purpose of defrauding the plaintiffs of any sum whatsoever; * * * denies that on December 31, 1919, plaintiffs went to said defendant bank and deposited with the defendant Two Hundred Dollars in cash, and that the then agent of the defendant entered to the credit of the plaintiff said sum of Two Hundred Dollars; * * * admits that said agent made an entry of a withdrawal of Fifteen Hundred Dollars, but denies that said entry was made without the knowledge or consent of plaintiffs and denies that said Fifteen Hundred Dollars has not been paid to plaintiffs and avers that said Fifteen Hundred Dollars was turned over to plaintiffs in currency on December 31, 1919; * * * denies that plaintiffs on January 9, 1922, delivered their deposit book for the purpose of having their accrued interest entered to their credit or that the bookkeeper advised of the aforesaid entry of the withdrawal of Fifteen Hundred Dollars, and denies that this was the first knowledge these plaintiffs had of the aforesaid entry; * * * denies that there is now due and owing to the plaintiff accrued interest in the amount of Two Thousand One Hundred Seventy-four Dollars on the whole amount of Two Thousand Four Hundred Five Dollars or any sum whatsoever. * * *"

As stated by the defendant, "the jury found against the plaintiffs on their claim of deposits not credited to them by the defendant bank, but found in behalf of plaintiffs on their claim

that the defendant wrongfully entered a withdrawal item of \$1,500 on December 31, 1919." The other items which were alleged in plaintiffs' amended statement of claim are not involved in this appeal, as the defendant concedes that "the single item in dispute at the present stage of the case is the item of December 31, 1919."

The plaintiffs, husband and wife, were very illiterate. They could not read nor write even their names, nor could they read nor write figures. When it was necessary for them to sign their names an employee of the bank would write out the names and the plaintiffs would then make their mark. They entrusted to the defendant, through its then servants, the making out of their deposit slips for the various deposits made by them, and relied wholly and solely upon the defendant to accurately and faithfully enter upon their pass book the entries of deposits, and to debit thereon only such withdrawals as they might make. At the time the plaintiffs opened the account with the defendant bank, a family history of the plaintiff Ellich McNeil was obtained by the defendant as a means for identification, and this was written upon plaintiffs' signature card, and as a further and distinctive means of identification, in view of plaintiffs' illiteracy, the defendant gave them a pass word, "New York." The defendant states: "The theory of fact of the defendant is that on December 31, 1919, the defendant, by one of its agents, properly paid out the sum of \$1,500 to the plaintiffs, who actually received the \$1,500, and the defendant entered the withdrawal in the bank book, and that the plaintiffs themselves got the money." The defendant admits that on December 31, 1919, in the evening, the plaintiffs were both present at the bank and made a deposit of \$200, and that one of defendant's agents entered such deposit in their bank book, that the plaintiffs, before the alleged withdrawal of \$1,500,

[illegible]

had to their credit a balance of \$1,002.62. Both plaintiffs denied that they withdrew any money on December 31, 1919, and specifically denied receiving \$1,500.

The defendant contends that under plaintiffs' pleadings and theory of fact a criminal offense is charged and therefore it was necessary for the plaintiffs to prove such offense beyond a reasonable doubt before they could recover. As we have heretofore stated, the defendant admits, in its brief, that the jury found against the plaintiffs as to all of the items in the statement of claim save the alleged withdrawal item of \$1,500 on December 31, 1919, and that this is the sole item for consideration on this appeal. It will be noted that the part of the statement of claim which we have italicized, and which relates to the item in question, does not charge a criminal offense, and for that reason, alone, the instant contention is without merit. But even if it did, there would be no merit in the instant contention, for the following reason: The court, in the oral instructions to the jury, stated, inter alia, the following:

"The Court instructs the Jury, that the burden of proof - of proving the case by a preponderance of the evidence, or by the greater weight of the evidence is on the plaintiffs, the plaintiffs being the party who brings the suit.

"Now, if you Gentlemen of the Jury, believe that the plaintiffs have proven their case by a preponderance of the evidence then the plaintiffs are entitled to recover judgment in this case.

"If, on the other hand, the Jury believes from the evidence that the evidence is evenly balanced so that you are unable to say where the preponderance is, or that it preponderates in favor of the defendant, then the Jury are instructed your finding must be in favor of the defendant, because under the law the defendant is entitled to that preponderance.

* * *

"The word preponderance, as a matter of law has a peculiar significance, but just the ordinary significance of it is this, by way of illustration, the Court can make recommendations to you, but after you Gentlemen of the Jury go to your juryroom and take the evidence that has been told by the plaintiffs and the defendant, if any have so testified, and you place that in your mind on one side,

had to make good a balance of \$1,000.00. Both plaintiffs

testified that they withdrew any money on December 31, 1967, and

specifically stated nothing in 1968.

The following testimony was given by Plaintiff, Defendant

and theory of fact a criminal offense in charged and therefore is

was necessary for the plaintiff to prove such offense beyond a

reasonable doubt before they will prevail. It is not necessary

that the defendant admit on his part, that the party took

against the plaintiff on all of the items in the statement of

claim save the alleged withdrawal item of \$1,000 on December 31,

1967, and that this is the only item for consideration on this

appeal. It will be noted that the part of the statement of claim

which we have attacked, and which relates to the item in question,

that the party withdrew \$1,000.00, and for that amount, claim, the

plaintiff mentioned in Exhibit A. But even if it did, there

could be no proof in the instant case, for the following

reasons: The court in the first instance in the party stated,

that the following

"The court instructs the jury that the burden of proof is

on the party who alleges the withdrawal, and by the

proof of the withdrawal as to the plaintiff's allegations

that the party who alleges the withdrawal.

"That, if you find from the testimony of the party, believe that the plaintiff

has proven their case by a preponderance of the evidence then

the plaintiff is entitled to recover judgment on this count.

"If, on the other hand, the jury believes from the evidence

that the plaintiff has not proven their case by a preponderance of the evidence

then the plaintiff is not entitled to recover judgment on this count.

"The court instructs the jury that the burden of proof is on the party who alleges the withdrawal, and by the proof of the withdrawal as to the plaintiff's allegations that the party who alleges the withdrawal.

in imaginary form, and then take all the evidence that has been introduced in the trial on behalf of the defendant, and place it on the other side, give both sides your calm counsel and dispassionate attention and weigh the testimony and couple to it all the facts and circumstances proved on the trial, then if you come to the conclusion that the evidence of the defendant does not outweigh the evidence of the plaintiffs then the preponderance is on the side of the plaintiff, that constituting the preponderance of the evidence, or greater weight of the evidence, and the plaintiffs are entitled to recover.

"If, after reviewing the various statements of the witnesses who have testified in this case you come to the conclusion that the evidence is evenly balanced, in other words you give as much credence to the plaintiffs as you do to the defendant and you cannot decide where the greater weight of the evidence is, or the evidence is evenly balanced so you are unable to say where it preponderates then the benefit must be given to the defendant, if the testimony is evenly balanced, or, it shows that there is some doubt in your mind; in this connection if you come to that conclusion, then the advantage must be given to the defendant, and the defendant is entitled to recover in that case and the plaintiffs not.

"The Court instructs the Jury, that the plaintiffs must establish their case by a preponderance of the evidence; however, this preponderance is not alone necessarily determined by the number of witnesses testifying to a particular fact or state of facts. In determining on which side the preponderance of the evidence is, the Jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the case, the relation or connection, if any, between the witnesses and the parties, the apparent consistency, fairness and congruity of the evidence, the probability or improbability of the truth of their several statements in view of all the other evidence, facts and circumstances proved on the trial; and from all these facts determine on which side is the weight of the evidence."

Neither the plaintiffs nor the defendant made any specific objection to the charge. Moreover, at the conclusion of the charge the following occurred: "(The Court (addressing the counsel): Now, is there anything further on either side? Mr. Kealy (attorney for defendant): Nothing, your Honor. Mr. Barnes (attorney for plaintiffs): No, your Honor." The attorney for the defendant not only made no objection to the trial court's statement of the law, but acquiesced in it. Rule 8 of the Municipal Court of Chicago requires that "objections to the giving or refusing of oral instructions to the jury must be specific and must be made immediately upon the conclusion of the charge and before the jury retire," and this rule

is, of course, enforced in the appellate courts. (See Miller v. Lake View State Bank, 240 Ill. App. 395, 404; Interstate Finance Corp. v. Commercial Jewelry Co., 301 Ill. App. 569; White v. Fandel Brothers, 256 Ill. App. 610 (Abet.); Howe v. Fulton, 225 Ill. App. 589; The Baldwin Co. v. Paley, 161 Ill. App. 340; Grollman v. Lake Geneva Piano Steel Co., 147 Ill. App. 332; St. John Cantius Bldg. & Loan Ass'n v. Padden, 262 Ill. App. 630 (Abet.)." Rule 8 of the Municipal court merely follows the rule enforced in all courts where oral instructions are given. (Pecoraro v. Halberg, 246 Ill. 95, 97.) The defendant was satisfied with the rule stated in the instructions and it will not be allowed to change its position in this court. As to the only item allowed by the jury, and now in question here, the trial court's instructions were more favorable to the defendant than the conceded facts and the law warranted. The defendant admitted that it owed plaintiffs the \$1,500 on December 31, but averred that it "was turned over to said plaintiffs in currency on December 31, 1919." Under such a state of facts the burden was upon the defendant to prove payment to the plaintiffs of the \$1,500.

The defendant contends that even if it be assumed that the plaintiffs had to prove their case by only a preponderance of the evidence, nevertheless, the verdict is contrary to the manifest weight of the evidence. After a very careful examination of the evidence we are satisfied that there is no merit in this contention, and we are in full accord with the verdict of the jury. The testimony of the plaintiffs that they did not receive the \$1,500 on December 31, 1919, is positive and convincing, and there are circumstances in the case that support it. At the time the account was opened, on May 19, 1919, an employee of the bank wrote on the withdrawal card the name "Ellich McNeal," and the plaintiff then made his cross upon the card. Upon the receipt produced by the

bank in support of its contention that the plaintiffs withdrew \$1,500 on December 31, 1919, appears the name "Elick McNeal," and between the words "Elick" and "McNeal" appears a cross. The defendant introduced a handwriting expert, who testified that the person who made the cross on the withdrawal card of May 19, 1919, also made the cross on the receipt of December 31, 1919, and the defendant argues that such testimony should be given great weight. The record contains photostatic copies of the two instruments, and after a careful examination of the same we are satisfied that the jury were warranted in disregarding entirely the testimony of the expert. In Travers v. Snyder, 38 Ill. App. 379, 382, the court said: "How can simply a mark be recognized as that of any particular person, without any proof of any particular characteristic by which it can be distinguished? And it seems to us that it proves nothing that one cross or mark is like another. It seems to us that it would be very unsafe, and lead to dangerous results, to allow such comparisons to be made and taken as evidence, unless at least some proof were made that the defendant's mark had some established characteristics, like a handwriting, that would enable it to be recognized. A mere cross or mark can not be identified, and it therefore stands for itself alone." (See also Watts v. Kilburn, 7 Ga. 356; Gilliam v. Perkinson, 4 Rand. (Va.) 325; Jones v. Hough, 77 Ala. 437; Kelpzas v. The White Eagle Bldg. & Loan Ass'n, 262 Ill. App. 629 (Abst.)." It is true that in the instant case the expert testified that he found certain characteristics common to both crosses, but we have been unable to find any characteristics in the two crosses that would warrant us in finding that they were both made by the same person. The defendant did not produce Goodman, who played an important part in the alleged withdrawal transaction of December 31. It did produce an employee named Brown, who on direct examination testified that \$1,500 was paid out to a

person who he was told was Ellich McNeil. In the cross-examination appears the following: "Did you see him put his cross on it, his mark? A. Well, it is my policy never to sign unless - Mr. Barnes: That is objected to. The Court: No, not what is your policy. The question is, I presume, did you know the man McNeil? A. No, I didn't know the man McNeil. I had no personal acquaintance with him at that time in 1919. The way I came to put my name on that withdrawal slip is this. Mr. Goodman was the savings bookkeeper at that time, and all withdrawals where the party was unable to sign his name and made his cross, had to be witnessed by two men, and Mr. Goodman - Mr. Barnes: If the Court please, I am going to object to this testimony unless he is testifying to what actually happened rather than what was the custom. The Court: He said he was there. This is what occurred in connection with this. The Witness: Yes. Mr. Goodman asked me to witness the signature of the man at his window, and I saw some man put his cross on there. I was informed this man was McNeil. He was a colored man. Q. Have you any other individual recollection of that occurrence now? Was there anybody with him? Do you recall that? A. I don't recall. That happened eleven years ago." The witness further admitted that he could not testify that he saw the actual payment of cash to anybody upon the day in question; that he had no personal memory on that subject.

The defendant contends that "the payment of \$1,500 by the defendant bank to the person presenting the pass book was a payment that discharged the bank." It argues that even if "somebody other than the plaintiffs got the \$1,500 on December 31, 1919, i.e., that some person, whose identity is unknown, presented the pass book on December 31, 1919, and withdrew \$1,500; * * * that the payment to the 'unknown' person presenting the pass book is a proper payment that discharged the bank. The rules printed in the pass book con-

...in the group - ...
...the following ...
...is the only ...
...is objected to ...
...I presume ...
...the man ...
...I had no personal acquaintance with him ...
...The way I came to get up ...
...in this ...
...and all ...
...into his ...
...Mr. ...
...testimony ...
...the ...
...is ...
...Godman ...
...and I ...
...was ...
...testimony ...
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...The witness ...
...that in ...
...constant ...
...The ...
...defendant ...
...that ...
...from ...
...was ...
...I ...

stituted part of the contract between the depositor and the bank." It is a sufficient answer to this argument to say that the jury were fully warranted in finding that the bank did not, on December 31, 1919, pay the \$1,500 to some unknown person who presented the pass book; that the bank book was never out of the possession of Bertha McNeil, one of the plaintiffs, that she carried it continuously in a bag fastened around her waist and that she never took it out of the bag save when she and her husband went to the bank to make their deposits. It is conceded that from the time the account was opened until December 31, 1919, the plaintiffs had never made a withdrawal from their account and on that date they made a deposit of \$200. There is much force in the argument of the plaintiffs that the claim of the defendant that the plaintiffs, on that date, deposited \$200 in currency and immediately withdrew \$1,500 in currency does not seem reasonable.

The defendant next contends that "as a matter of law the unreasonable delay by the plaintiffs in discovering the allegedly incorrect withdrawal entry of December 31, 1919, estops the plaintiffs from attempting to show that the withdrawal entry was incorrect." In their brief the plaintiffs answer this contention by showing that the defendant neither by its pleadings nor otherwise raised the question of estoppel in the trial court and that therefore they can not raise that question for the first time in this court. In its reply brief the defendant admits that the plaintiffs' point is well taken and attempts to raise a new question, viz: "A breach of duty by the plaintiffs causes them to lose their right of action." Under our practice we would be justified in disregarding this new contention. However, we have considered the same and find it without the slightest merit. The record shows that the defendant did not ask to have such a defense presented to the jury by instructions, and for that reason,

in conformity with the provisions of the Act of March 3, 1879, in relation to the
of the fact that the plaintiff, in the case, deposited with
there is much more in the account of the plaintiff than in the
their bank account and on that date they made a deposit of \$100.
which occurred in 1879, the plaintiff's bank never made a withdrawal
deposited. It is suggested that from the time the account was opened
the bank was a co-defendant and that the bank is liable for
a big liability account has been paid and that the money was paid at
Hobbs, one of the plaintiffs, that the matter is continuing in
fact that the bank paid no money out of the possession of Hobbs
1879, but the bank is now liable for the money paid.

Truly yours,
It is a sufficient answer to this argument to say that the bank was
allied part of the contract between the plaintiff and the bank.

The defendant must acknowledge that "as a matter of law the defendant is liable for the plaintiff's injury."

alone, it should not be heard to raise this question for the first time in this court. The argument of the defendant in support of the new contention is that the plaintiffs let the time go by from December 31, 1919, to January 9, 1922, without looking at their bank book and that they were therefore negligent and careless and for that reason cannot recover against the bank. In support of this contention the defendant cites cases like Folsom v. Northern Trust Co., 237 Ill. App. 419, wherein it was held that where a bank paid certain forged checks purporting to be drawn against a depositor's account and charged the checks to such account and delivered the canceled checks, together with statements, to the depositor, the latter lost his right of recovery against the bank by delaying six months, after discovery of the forgery, before notifying the bank. Such cases have no application to the facts of the instant one. The illiterate plaintiffs relied solely upon the defendant to accurately and honestly enter upon the pass book the entries of deposits made, and to debit thereon only such withdrawals as were actually made. They could not read the items in the pass book and they did not know that it contained a withdrawal item of \$1,500 until January 9, 1922, when they presented the book to the bank for the purpose of having interest credited thereon and were then told of the withdrawn item, whereupon they made an immediate complaint to the bank officials. There is undisputed evidence to the effect that the bank officials at first took the position that the complaint was a just one.

The plaintiffs have filed cross-error alleging that the trial court erred in not including in the judgment interest at the legal rate from July 1, 1919, to February 2, 1931, and we are asked to enter judgment in this court for \$2,100. This we cannot do.

The instant case appears to have been ably and carefully tried by the trial court and errors usually assigned in jury trials are not urged here. We are satisfied that the defendant has had a full and impartial trial and the judgment of the Municipal court of

AFFIRMED.

alone, it should not be used to raise this question for the first

time in this court. The argument of the defendant in support of

the new contention is that the plaintiff let the time go by from

December 31, 1913, to January 9, 1922, without looking at their bank

book and that they were therefore negligent and careless and for that

reason cannot recover against the bank. In support of this contention

the defendant cites cases like Johnson v. Southern Trust Co., 127 Ill.

225, 119, wherein it was held that where a bank paid certain checks

checks purporting to be drawn against a depositor's account and

charged the checks to such account and delivered the canceled checks

together with statements, in the deposited, the bank is not liable

of recovery against the bank by delaying six months after discovery

of the forgery, before notifying the bank. Such cases have no

application to the facts of the instant case. The Illinois plain-

tiff relied solely upon the defendant to immediately and honestly

enter upon the bank book the entries of deposits made, and to debit

thereon only such withdrawals as were actually made. They could not

read the items in the bank book and they did not know that it con-

tained a withdrawal item of \$1,500 until January 9, 1922, when they

presented the book to the bank for the purpose of having interest

credited thereon and were then told of the withdrawal item, whereupon

they made an immediate complaint to the bank officials. There is

undisputed evidence to the effect that the bank officials at first

took the position that the complaint was a lost case.

The plaintiff have filed answers denying that the

trial court erred in not including in the judgment interest at the

legal rate from July 1, 1919, to February 2, 1922, and no one asked

to enter judgment in this court for \$1,100. This we cannot do.

The instant case appears to have been only and exclusively

tried by the trial court and no one usually assigned to jury trials

and not upon facts. It was established that the defendant had a

35675

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

v.

HYMAN JANSKY,
Plaintiff in Error.

717
ERROR TO MUNICIPAL
COURT OF CHICAGO.

267 I.A. 612⁵

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An information was filed in the Municipal court of Chicago against the defendant, Hyman Jansky, charging that he "on the 11th day of January, A. D. 1931, at the City of Chicago, aforesaid, being then and there the lawful husband of Tobey Jansky and the said Tobey Jansky then and there being the lawful wife of said defendant, the said defendant did then and there, without reasonable cause, neglect and refuse to maintain and provide for his said wife, said wife then and there being in destitute and necessitous circumstances. All which acts of said defendant are and were then and there contrary to the form of the Statute," etc. The defendant filed a plea of not guilty, and, having elected to waive a trial by jury, the cause was submitted to the court, and after evidence heard the court found the defendant guilty in manner and form as charged in the information. A motion for a new trial was overruled; also a motion in arrest of judgment, and thereupon judgment was entered, which ordered the defendant to pay to the clerk of the court, for the use of his wife, the sum of five dollars weekly for and during the period of one year. To reverse this judgment the defendant has sued out this writ of error. The state's attorney has not seen fit to defend the judgment.

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2

THOMAS WALSH

1999-2000: 27,000,000

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1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

To receive the benefit of the Bill, our members must

Chinese wanted the American, John Lewis, to help him

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positive, a multi-line multi-bit resolution also maintains the

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These estimates are not intended to be used as a basis for making any other estimates.

incident 1940 to 1942, 1944-1945. 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 2684-2685,

10. *Chrysomelids* (see also 11. *Chrysomelids*)

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es darüber zu klären, ob diese beiden Aspekte auch bei anderen Gruppen von Patienten zu beobachten sind.

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No other article this year was distributed with the same

604

The defendant contends that the finding of the court is contrary to law for the reason that the alleged marriage between him and Tobey Jansky is absolutely void and that the relationship of husband and wife never existed between him and Tobey Jansky, and that a void marriage cannot be made the basis of an order for support, and that therefore the finding and judgment of the court are erroneous and should be reversed.

Tobey Jansky, the alleged wife of the defendant, who was also the prosecuting witness, testified that she and the defendant were married in 1923, in Chicago, that the defendant abandoned her about five weeks before the time of the filing of the information and that at the time of the abandonment she was in necessitous circumstances. She further testified that her mother and the mother of the defendant were sisters, and that she and the defendant are first cousins. By sec. 1, par. 1, ch. 89, Cahill's Ill. Rev. Statutes, marriages between cousins of the first degree are declared to be incestuous and void. In the case of Arado v. Arado, 205 Ill. App. 261; 281 Ill. 123, the complainant filed her bill for divorce and it appeared that she and the defendant had entered into a ceremonial marriage on October 4, 1894, and for many years thereafter had lived together and cohabited as husband and wife and that as the fruits of said marriage two children were born to them, both of whom were still living, and that the complainant and defendant were cousins of the first degree, and it was contended by the complainant that a marriage contracted between first cousins was merely voidable and not void, but it was held that such a marriage was void in its inception and that the relation of husband and wife had never existed between the parties, and that therefore the trial court properly refused to make an allowance to the complainant.

The defendant contends that the finding of the court is contrary to law for the reason that the alleged marriage between him and Toby Jannay is absolutely void and that the relationship of husband and wife never existed between him and Toby Jannay, and that a valid marriage cannot be made the basis of an order for support; and that therefore the finding and judgment of the court

and that at the time of the agreement she was in possession of the same. She also stated that she was in possession of the same at the time of the agreement and that she was in possession of the same at the time of the agreement.

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF STAFF
WASHINGTON, D. C. 20315

There is no record of any other persons being present at the time of the shooting.

On the third of said marriage two children were born to them, both of whom were still living, and that the complainant was defendant's only child.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to provide any information on this subject.

properly referred to as an allowance to the complainant.

It is very clear, under the facts of this case, that the trial court was not warranted in finding the defendant guilty and entering the judgment in question, and the judgment of the Municipal court of Chicago must be and it is reversed.

REVERSED.

Kerner, P. J., and Gridley, J., concur.

It is very clear, under the facts of this case, that

the trial court was not warranted in finding the defendant guilty and entering the judgment in favor of the plaintiff, and the judgment of the trial court of guilty must be set aside.

REVEREND

THOMAS, J. J., and HENRY, J. J.

35715

RALPH L. PAINTER,
Appellee,

v.

ILLINOIS TRACTION, INC.,
Appellant.

727
APPEAL FROM SUPERIOR

COURT, COOK COUNTY.
267 I.A. 613¹

MR. JUSTICE SCHELAN DELIVERED THE OPINION OF THE COURT.

This is an action on the case, which was tried before the court, with a jury, and a verdict was returned in favor of the plaintiff and his damages were assessed in the sum of \$12,500. The defendant has appealed from the judgment entered on the verdict.

The original declaration consists of two counts, the first alleges general negligence in the operation of the electric car and the second alleges failure to warn the plaintiff of the approach of the car. Both counts allege due care and caution on the part of the plaintiff. Two additional counts were thereafter filed. The first alleges that the defendant wantonly and wilfully ran its electric car into the automobile of the plaintiff. The second alleges that the defendant wantonly and wilfully ran its electric car at a high and dangerous rate of speed and without giving warning of its approach to the crossing, and in a manner dangerous to life and limb wantonly and wilfully ran its car upon and against the automobile in which the plaintiff was riding. To all of the counts the defendant pleaded the general issue. It also filed a special plea, which, it concedes in its brief, was abandoned. The case went to the jury upon all of the counts.

It is conceded that the plaintiff was seriously injured in the accident, ^{which} occurred on the afternoon of August 21, 1926.

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• **ATTENDING** • **ONLY**

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1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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the court, James and I went, and a variety of new weapons were sent to the court.

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The original collection consists of two copies, the

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1. The first group of variables includes the demographic characteristics of the respondents, such as age, gender, and education level. These variables are used to control for potential confounding factors that may influence the dependent variable.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

THESE THINGS ARE IMPORTANT, BUT THEY ARE NOT THE ONLY THINGS THAT ARE IMPORTANT.

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

The day was bright and clear. The plaintiff was about forty years of age and resided at LaSalle, Illinois, where he was employed as a roofer by the F. Becker Asphaltum Roofing Company. On the day in question he was on his way to attend a picnic, given by the Roofing Company for its employees and agents, at a farm or picnic grounds located near the village of Dalsell. Between Peru and Spring Valley, running in an easterly and westerly direction is a single track over which the defendant operated suburban electric cars. State Route No. 7, "a hard road," is seven feet south of the south rail of the track and parallels the track. One and a half miles west of Peru and three and one-half miles east of Spring Valley is "County Line road," a graveled road, which commences at State Route No. 7 and extends northward to Dalsell, situated about a mile and a half to the north. County Line road does not extend to the south of State Route No. 7. From Peru to the County Line road there are no buildings or obstructions between State Route No. 7 and the railroad track and "there was no shrubbery or anything that constituted an obstruction to the view anywhere there. The south rail of the interurban and the pavement are on a level. There are poles on the north side of the right of way holding the trolley, the road being operated by electricity. * * * Looking east from county line crossing an interurban can be seen without any trouble for a mile, on a clear day a distance of a mile." From Peru westward there is "a straight way" for about two miles and "a perfectly level roadway." At County Line road there was no settlement and it was a flag stop station. The train in question, known as the Clock Works special, ran between West Peru and Spring Valley and was proceeding in a westerly direction at the time of the accident. The picnic began in the morning. The plaintiff and a companion, Earl Cannon, started for the picnic grounds about 11:40 a. m. The plaintiff was driving a Ford touring car,

The day was bright and clear. The family and about forty persons
 of age and residence at Lincoln, Illinois, about the year 1840, and
 together by the P. & N. Railroad, leaving Chicago, on the day in
 question he was on his way to attend a picnic, given by the Ladies
 Temperance for the employment and support, at a farm on Chicago grounds
 located near the village of Lincoln. Between town and village being
 running in an easterly and westerly direction in a straight line over
 the hills and valleys, through woods, fields and prairie. The road
 is 7 1/2 "a half mile" is about two miles of the south side of the
 creek and parallel the creek. One and a half miles west of this
 the river and one-half mile east of Spring Valley is "County Line"
 road, a gravelled road, which commences at Chicago house No. 7 and
 extends northward to Lincoln, situated about a mile and a half to the
 east. County line road runs east and west in the north of State
 road No. 7. The road in the north runs from west to east
 straight in continuation between these points No. 7 and the railroad
 road and State road are situated on opposite sides of the railroad
 station in the river valley. The road will be the inter-
 section and the government line on a farm. There are hills on the north
 side of the river of very rolling the hills, the road being elevated
 1/2 mile. * * * Looking west from county line crossing on
 railroad can be seen without any trouble for a mile, on a clear
 day a distance of a mile. From this elevated place is a distance
 of about two miles and "a perfectly level country." At County
 line road there was no settlement and it was a fine crop of wheat
 on level in question, known as the Clark town square, and between
 the town and Spring Valley and was growing in a healthy condition
 the river at the railroad. The picnic began in the morning. The
 railroad and a suspension, and Cannon, started for the picnic grounds

which had no curtains, and beside him on the front seat was his housekeeper, Mary Lysert. Standing in the rear of the car and hanging over the front seat was the plaintiff's son, then a boy thirteen years of age. Cannon was driving a one-seated Ford coupe, and seated next to him on his right was the plaintiff's daughter, and on her right another son of the plaintiff was seated. Both automobiles proceeded westward from Peru on State Route No. 7, Cannon taking the lead. The latter was the main witness for the plaintiff. To quote from his testimony: "When we got to the city limits there was another car coming from Fourth street and it got between us. I then continued on down on State Route No. 7 about a mile and a half or two miles to what is known as the county line road. There was just a machine between us, he (plaintiff) was probably 25 maybe 30 feet behind me. The county line road from the hard road is a gravel road on across the tracks; across the tracks there is a little slope from the track down. The county line road is 30 to 60 feet wide and runs up north past Dalzell, which is a mile or a mile and a half from State Route No. 7. In the county line road near the railroad was a small waiting station on the west side of the county line road and 8 to 10 feet from the north rail of the interurban tracks, I did not make any measurements of that. There was no other structures of any kind on the county line road at that particular point. There was no bell, wig-wag, mechanical signaling device, gates or flagman at that point. As I came west on State Route No. 7 and approached the county line road I slowed up to make my turn; then I pulled on off, just kind of angled off, had my front wheels practically on to the rail and looked back at the track. As I looked up the track I seen an interurban. I should judge it was between 300 and 900 feet away; I moved on across, and I was moving around five to six miles an hour. As I crossed the tracks I looked back through

which had no curtains, and beside him on the front seat was the
 newspaper, Mary Lynch. Looking in the rear of the car and
 hanging over the front seat was the girl's bag, and a box
 containing some of her things. When we turned a corner and came
 and seated next to him on his right was the girl's daughter,
 and on her right another son of the family was seated. Both
 children were dressed in the best of the family. The daughter
 taking the lead. The father was the main witness for the family
 life. To quote from his testimony: "When we got to the city limits
 there was another car coming from North Street and it got between
 us. I then continued on down on State Street No. 7 about a mile and
 a half or two miles so that it took me an hour and a half to go
 as far as a machine between us, no (girl's) and probably 25 miles
 to the south of us. The county line from the road is a
 gravel road on which the tracks cross the tracks there is a little
 space from the road. The county line is about 1/2 mile from
 wide and runs up north past the mill, which is a mile or a mile and
 a half from State Street No. 7. In the county line road near the
 mill was a small building on the west side of the county
 line road and it is about 1/2 mile from the north side of the intersection
 tracks. I did not make any observations of them. There was no other
 structures of any kind on the county line road. I did not see
 any. There was no well, no building, no building, no building,
 and I saw that on State Street No. 7
 and explained the county line road I showed up to show my own; then
 I pointed out the kind of light off, but up from the
 building on to the rail and looked back at the tracks. As I looked
 up the track I saw an intersection. I should judge it was between 1/2
 and 3/4 mile from the road. I saw no other and I was looking around five to

my back window to see if Mr. Painter was coming. I saw his car just starting to make the turn. The interurban car at that time was somewhere in the neighborhood of 400 feet up the track. Right after that the interurban hit him in the right hind wheel, turned its end and threw it over probably 20, 25, 30 feet - I wouldn't say just exactly - against this building and knocked the east side and the south ends out of this building. * * * From the time I first observed the interurban car when it was approximately 900 feet away no whistle was blown or bell sounded prior to the accident. * * * In my opinion Mr. Painter's car was moving five or six miles an hour as it was crossing the track. * * * The car or train which struck Mr. Painter's car was known as the Clock Works Special. There were a large number of passengers on the car from Spring Valley and those suburban towns around there. * * * The county line road was not a stop for the Clock Works Special car. Prior to the time of the accident the interurban was going pretty fast. After the accident it stopped between 300 and 350 feet west of the crossing. * * * When I came down that hard road before I got ^{to} the county line crossing I was going between 20 and 25 miles an hour. Before I crossed I looked back and saw the interurban. I had my car under control. I could see the interurban. I was 25 or 35 feet ahead of Mr. Painter's car and there was a car between me and Painter's car at that point. I then proceeded across the track. I hadn't stopped my car before he was struck. After he was struck I did. After I crossed the railroad track I was just barely moving along. I had gone about thirty feet north from the railroad track at the time the collision occurred. I know the stop sign on the north side of the railroad tracks and the hard road. I don't believe there was a stop sign there at that time, but from the north rail of the railroad when the impact hit, I was about thirty feet north of the north rail. I

had been moving all the time driving the car. I was only interested in seeing that Painter turned off on that road. I was not paying any particular attention to anything but that Painter would turn off on that road. I also was watching the interurban; I wanted to see, naturally; the man would look before he pulled onto a railroad track.

* * * After I crossed the railroad track and looked back in the direction of Mr. Painter's car, I observed that he turned his head and looked up the track. There was not anything to prevent him seeing anything when he looked up the track." The plaintiff testified that as they were going westward on State Route No. 7 they stopped at a filling station, where he put water in his radiator, and that the last thing that he could remember was getting in the car and starting on his way again; that he remembered nothing after that until he found himself in the hospital at Spring Valley. In his brief he states that "the effects of the injuries plaintiff sustained were such as to wipe out from his memory everything that happened at the time of the accident." Mary Dysert testified that as Cannon's car came to the County Line road he slowed down and crossed the tracks; that a car that was between Cannon's and plaintiff's "swayed out" and went ahead of Cannon's, "that is straight ahead;" that the plaintiff slowed down and held out his hand to warn the person behind that he was going to make a turn; that he made the turn and looked in front of her "to see if the vision was clear, and then he proceeded on across the track, or started to cross the track but the interurban was too close and hit us;" that the hind wheel of the automobile was struck ^{by} the car; that she did not hear any siren or whistle from the interurban car and that at that time there was no bell, wig-wag or other mechanical device maintained at the crossing to warn of the approach of cars; that when the plaintiff was almost across the track he

had been moving all the time during the day. I was only interrupted
in seeing that Walker turned off the light. I was not paying any
particular attention to Walker but was looking at the
light. I also was watching the instrument. I wanted to see
exactly the way the light was being put out with a red light beam.
... After I crossed the railroad track and looked back in the
direction of the Walker's car, I observed that he turned his head
and looked up the track. There was no sign of him moving the way
anything when he looked up the track. The glint of light that
as they were going westward on State Route No. 7 they stopped at a
filling station, where he put water in his radiator, and that the
last thing that he could remember was getting in the car and starting
on his way again; that he remembered nothing after that until he found
himself in the hospital at Spring Valley. At the trial he stated
that "the effects of the injuries sustained were such as to
wipe out from his memory everything that happened at the time of the
accident." Very recently testified that he "cannot" say that he
knows that he never saw and cannot see the light that was
seen by Walker's car and Walker's "motor car" and was alone
at Cannon's. "That is exactly what" that the glint of light down
and held out his hand to show the person behind that he was going to
make a turn; that he made the turn and looked in front of him "to
see if the light was alone, and then he proceeded on across the
road, or started to cross the road but the instrument was not alone
and his eye" that the light beam of the automobile was aimed at the
car, that the light beam was aimed at the instrument from the instrument
and that at that time there was no light, light or other
lighting device maintained at the crossing to warn of the approach
of the automobile.

looked again and saw the car and put his foot on the accelerator; that before the plaintiff made the turn he slowed down to a speed of five or six miles an hour. Upon cross-examination this witness admitted that in a proceeding brought by the plaintiff against the Roofing Company she testified that as the plaintiff started to make the turn he saw the electric car and put his foot on the accelerator. Betty Miller, a daughter of the plaintiff, testified that she was seated in the automobile of Cannon and that after Cannon turned off State Route No. 7 onto the County Line road she looked out of the window to see if her father was following, and she saw her father's car trying to make the turn; that his machine slowed down and she saw him look down the track and start across, and that the train at that time was half a block away; that she did not hear any bell at the crossing or any wig-wag or mechanical warning to give warning of the approach of cars, nor did she hear any whistle blown or siren sounded; that when she was crossing the track she glanced down the track as far as she could see but there was no car in sight; that the track was straight along there and it was a bright, clear day; that she first saw the car after Cannon's automobile got across the track; that when Cannon's car had gone 25 or 30 feet beyond the track the crash came.

The defendant introduced evidence to the effect that the electric car was equipped with a whistle or siren operated with compressed air, which can be heard by a person with good hearing for a distance of four or five miles, and that when the car reached the whistling board, 300 feet east of the County Line road, the siren was sounded and the speed of the car was then reduced from 35 miles to between 20 and 25 miles an hour, and that the plaintiff's car, which had been traveling along side of the electric car, pulled slightly ahead of it and suddenly turned north on the tracks at the County Line

looked again and saw the man and put his foot on the accelerator;
that before the plaintiff made the turn he almost drove to a speed
of five or six miles an hour. Upon cross-examination this witness
admitted that in a preceding paragraph by the plaintiff against
the Hooley Company was testified that as the plaintiff started to
make the turn he saw the electric car and put his foot on the
accelerator. Betty Wilson, a daughter of the plaintiff, testified
that she was seated in the automobile of Cannon and that after Cannon
turned off State Route No. 7 near the Convey line road she looked out
of the window to see if her father was following, and she saw her
father's car trying to make the turn; that his machine almost drove
and she saw him look down the track and start across, and that she
knew at that time was half a block away; that she did not hear any
bell at the crossing or any warning or mechanical warning to have
warning of the approach of cars, nor did she hear any whistle blown
or alarm sounded; that when she was crossing the track she glanced
down the track as far as she could see but there was no car in sight;
that the track was straight along there and it was a bridge, about 600
feet the first car after Cannon's car had gone 25 or 30 feet beyond the track
the track name.
The defendant introduced evidence to the effect that the
electric car was equipped with a whistle or alarm equipped with
compressed air, which can be heard by a person with good hearing for
a distance of four or five miles, and that when the car reached the
intersection point, 250 feet west of the Convey line road, the alarm was
sounded and the speed of the car was about 25 miles per hour;
between 20 and 25 miles an hour, the fact the plaintiff's car, which
was then traveling along side of the electric car, pulled slightly
west of it and suddenly turned north on the bridge at the Convey line

road. But in the view that we have taken of this appeal it is necessary for us to consider only the evidence for the plaintiff and certain undisputed facts in the case.

The defendant has assigned and argued a number of alleged errors, but we deem it necessary to notice only one. It strenuously contends that "the evidence failed to prove due care on the part of plaintiff and, on the contrary, established that he was guilty of gross negligence;" that the evidence for the plaintiff "affirmatively proves that the plaintiff was guilty of exceedingly gross negligence." In Greenwald v. B. & O. R. R. Co., 332 Ill. 627, 631-3, the court said: "The rule has long been settled in this State that it is the duty of persons about to cross a railroad track to look about them and see if there is danger, and not to go recklessly upon the track but to take proper precaution to avoid accident. It is generally recognized that railroad crossings are dangerous places, and one crossing the same must approach the track with the amount of care commensurate with the known danger, and when a traveler on a public highway fails to use ordinary precaution while driving over a railroad crossing, the general knowledge and experience of mankind condemns such conduct as negligence. (Graham v. Hagmann, 270 Ill. 252; Lake Shore and Michigan Southern Railroad Co. v. Hart, 87 id. 529; Chicago, Burlington and Quincy Railroad Co. v. Damerell, 81 id. 450; Toledo, Wabash and Western Railway Co. v. Jones, 76 id. 311.) One who has an unobstructed view of an approaching train is not justified in closing his eyes or failing to look, or in crossing a railroad track in reliance upon the assumption that a bell will be rung or a whistle sounded. No one can assume that there will not be a violation of the law or negligence of others and then offer such assumption as an excuse for failure to exercise care. The law will not tolerate the absurdity of allowing a person to testify that he looked but did not see the train when the

... But in the view that we have taken of this appeal it is necessary for us to consider only the plaintiffs?

* 1944 100% 100% 100% 100% 100% 100% 100% 100% 100% 100%

It is recommended that the following information be furnished to the Bureau of the Census:

to find out how often and where the birds are seen.

to telling you of said commitment, together with me, two attorneys

Given religiousness, then the evidence for the "Religiosity" hypothesis

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"The wife has been sectioned in this house since 12 the day."

Two main trends have been identified: a growth of people entering the

and there is no possibility of an error, because it is not possible to have a

to take proper provision to well-ventilate. It is generally recognized

which has allowed us to develop an effective business plan for the future.

the same must approach the work with the intent of mere compromise

There are many other factors that can affect the results of a study, such as the quality of the data, the choice of statistical methods, and the interpretation of the results. It is important to be aware of these factors and to take steps to minimize their impact on the results of a study.

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to save and protect, at all times, the life and health of the people.

...to be a member of the ...

THE END OF THE WORLD IS AT HAND AND IT WILL BE WITH A BANG AND NOT A WHISPER.

even that there will not be a violation of the law or negligence

...and the fact that the ...

...the following:

view was not obstructed, and where, if he had properly exercised his sight, he must have seen it. (Schlauer v. Chicago and Southern Traction Co., 253 Ill. 154.) The question of due care on the part of a plaintiff is a question for the jury when there is any evidence given on the trial which, with any legitimate inference that may be legally and justifiably drawn therefrom, tends to show the use of due care, but where the evidence, with all legitimate inferences that may be legally and justifiably drawn therefrom, does not tend to show due care on the part of plaintiff the trial court is justified in instructing the jury to return a verdict for defendant. * * * The duty resting upon one who crosses a railroad track is not only to listen but to look, and the fact that no bell was rung or whistle blown, if such was the fact, would not excuse him from using due care to look in the direction from which a train might be coming, and in this case had appellant's servants done so it seems clear that the collision would have been avoided." The plaintiff, in answer to the instant contention, ignores the Greenwald case and makes no reference to his evidence that bears upon the vital question of contributory negligence. The sole answer made by him^{to the present contention} is: "As to the question of contributory negligence, it is only necessary for us to say that the testimony was conflicting, so that the trial Court very properly submitted it to the jury." Following this statement the plaintiff cites these cases: Vail v. Graham, 259 Ill. App. 172; Provensano v. Ill. Cent. R. Co., 263 Ill. App. 530; Gills v. N. Y. C. & St. L. R. R. Co., 342 Ill. 455, and Chicago & Joliet Ry. Co. v. Hanis, 230 Ill. 530. Vail v. Graham merely states the well settled rule of law in this state that if there is any evidence in the record from which, if it stands alone, the jury could, without acting unreasonably in the eye of the law, find that all of the material averments of the declaration have been proved, then the cause should be submitted to a jury. In

The first question is whether the defendant is guilty of the crime charged. The second question is whether the defendant is guilty of the crime charged. The third question is whether the defendant is guilty of the crime charged. The fourth question is whether the defendant is guilty of the crime charged. The fifth question is whether the defendant is guilty of the crime charged. The sixth question is whether the defendant is guilty of the crime charged. The seventh question is whether the defendant is guilty of the crime charged. The eighth question is whether the defendant is guilty of the crime charged. The ninth question is whether the defendant is guilty of the crime charged. The tenth question is whether the defendant is guilty of the crime charged.

Provenzano v. Ill. Cent. R. Co., decided by this division of the court, the trial court directed a verdict for the defendant at the conclusion of the plaintiff's evidence upon the theory that the evidence showed that the plaintiff was guilty of contributory negligence. We held that the Greenwald case, did not apply to the facts of that case, for the reason that it there appeared that a train, admitted by the defendant to have been going fifty miles an hour, came out of a cut and across Harrison street in the village of Hillside, at a sharp angle; that the crossing was at the top of a hill in the village; that the train was approaching on a track that ran in almost the same direction as that in which plaintiff was going and that some distance from the crossing the train passed through a cut or defile and the view where it emerged from the defile was obstructed by a greenhouse and trees; that in slowly ascending the hill plaintiff looked several times down the track and kept on the lookout as much as he could and because of the narrowness of the street and a truck approaching from the opposite direction he was also obliged to watch the road, and we held that under such a state of facts the trial court was not warranted in directing a verdict for the defendant upon the theory that the evidence for the plaintiff showed contributory negligence. The essential difference between that case and the instant one is that in the former the view of the plaintiff was obstructed, while in the instant one the plaintiff had an unobstructed view of the approaching train. In the Gills case the court cites with approval the Greenwald case, but holds that it did not apply, for the reason that there was evidence that as the plaintiff approached the railroad crossing he did not see nor hear an approaching train because a long freight train was proceeding along one of the two railroad tracks at the place in question and the engine of that train was emitting smoke and the train was making a noise. In the Wanic case, decided before the Greenwald case,

the court, in passing upon the question as to whether the plaintiff was guilty of contributory negligence, emphasizes the evidence bearing upon alleged obstructions to view. The supreme court has not changed or modified the ruling it made in the Greenwald case. In fact, in a later case, Dee v. City of Peru, 343 Ill. 36, 41-3, that ruling is followed.

The crossing in the instant case involved only one track. The distance between the rails was four feet nine inches, and from the south end of a tie to the north end, less than eight feet. The plaintiff, as he reached the crossing, in fact, before he reached it, had an unobstructed view down the track to the eastward for a distance of a mile at least. His eyesight and hearing were good at the time of the accident and he was accustomed to handling an automobile. The testimony for the plaintiff is that he looked to the east before he started to cross the track, and therefore he must have seen the approaching train, and in ample time to have avoided the danger. Cannon testified that as he crossed the tracks he saw the electric car between 300 and 900 feet away and that as the plaintiff started to make his turn the electric car was "somewhere in the neighborhood of 400 feet up the track." The undisputed evidence is that "looking east from county line crossing an interurban can be seen without any trouble for a mile, on a clear day." It is difficult to imagine a more unobstructed view at a railroad crossing. We are satisfied that we must hold that the plaintiff, under the ruling in the Greenwald case, was guilty of contributory negligence as a matter of law.

While the trial court allowed, over the objection of the defendant, the two counts charging wilful and wanton conduct to remain in the case, nevertheless, it is apparent that the charges contained in these counts played no part in the determination of the case by the jury. The plaintiff offered no instruction which

defined wilful and wanton conduct or that explained to the jury the fundamental differences, from the viewpoint of the law, of a case based upon a count which charged wilfulness and wantonness and one based upon mere negligence. The defendant offered one instruction upon this subject but the court refused to give it. Neither the plaintiff nor the defendant asked the court to submit to the jury a special interrogatory as to the charges made in the wilful and wanton counts. The instructions for the plaintiff proceed upon the theory that he was obliged to use ordinary care for his own safety at the time of the accident and that to recover he must prove that the defendant was guilty of negligence, as alleged in the declaration, "and that before and at the time of the accident in question the plaintiff was in the exercise of ordinary care for his own safety." The plaintiff, in this court, has not contended, in his brief, that the verdict could be sustained upon the theory of wilful and wanton negligence. In fact, in answer to the contention of the defendant that the trial court committed reversible error in refusing to direct a verdict in favor of the defendant under the two wilful and wanton counts, the plaintiff states: "No reversible error was committed by the Court in refusing to direct a verdict in favor of the defendant under the two wilful counts. A plaintiff may recover under a declaration charging simple negligence and wanton and wilful negligence even though there is no evidence to support the wanton and wilful counts." We are justified in assuming from the evidence in the case and from the attitude of the plaintiff in the trial court, and here, that the counts charging wilful and wanton negligence played no part in the determination of the case.

Holding, as we do, that under the plaintiff's evidence he was guilty of contributory negligence as a matter of law, the judgment of the Superior court of Cook county must be reversed and it is so ordered.

REVERSED.

Kerner, P. J., and Gridley, J., concur.

defined willful and wanton conduct as that required by the jury in
 negligence, from the viewpoint of the law, of a case
 based upon a wanton willful conduct and negligence and not
 upon mere negligence. The defendant's willful and wanton
 upon this subject and the court refused to give it. Neither the plain-
 tiff nor the defendant asked the court to submit to the jury a special
 instruction as to the charges made in the willful and wanton counts.
 The instruction was given to the jury and the jury found in favor of
 the defendant. The defendant was not entitled to the instruction at the time of
 the accident and that as recovery was made from the defendant was
 policy of negligence, as alleged in the declaration, "and that before
 and at the time of the accident in question the defendant was in the
 exercise of ordinary care for his own safety." The plaintiff, in this
 case, has not contended, in his brief, that the verdict could be
 sustained upon the theory of willful and wanton negligence. In fact,
 in answer to the contention of the defendant that the trial court
 committed reversible error in refusing to submit a verdict in favor of
 the defendant under the willful and wanton counts, the plaintiff
 stated: "No reversible error was committed by the Court in refusing
 to direct a verdict in favor of the defendant under the two willful
 counts. A plaintiff may recover under a negligence or negligent misfeasance
 declaration and under the willful negligence and wanton counts in an
 action to enforce the contract and willful counts." It was held
 in answering from the answer in the case and from the admission of the
 plaintiff in the trial brief, and hence that the court should direct
 the verdict in favor of the plaintiff in the declaration of the case.
 Holding, as we do, that under the plaintiff's evidence the
 willful and wanton negligence is a matter of law, the judgment
 of the District Court of Cook County shall be reversed and it is so

35753

JACK NILES COMPANY, a Corporation,
Appellee,

vs.

HUGO MEYER,
Appellant.

73
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 613²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff sued the defendant in the Municipal court of Chicago in an action of the first class. The cause was submitted to the court, the issues were found against the defendant, and the plaintiff's damages were assessed at the sum of \$1,318.90. Judgment was entered upon the finding and the defendant has appealed.

That the plaintiff delivered the furniture in question to one J. Newton is not disputed, and its claim against the defendant is based upon the theory that "the defendant, both before and after the delivery of the furniture, directly promised to pay for the same but failed to do so," and "that J. Newton was the agent of the defendant for the purpose of receiving the merchandise." The defendant's amended affidavit of merits averred: "(1) That the defendant did not purchase the goods, etc.; (2) that the defendant did not receive the goods, etc.; (3) that the goods, etc., were not sold or delivered to the defendant at his special instance and request; (4) that the goods, etc., were of a value exceeding \$500 and that no part of them were delivered to or accepted by the defendant, that there was not any memorandum or note in writing signed by the defendant or by any person authorized by him, and that the defendant or any person authorized by him did not give anything in earnest to bind the contract, etc.; and (5) that the defendant was not indebted to the plaintiff in any sum."

The evidence shows that on March 11, 1931, the defendant's

JACK WILSON COMPANY, a Corporation,
Appellee,

HUGH MEYER,
Appellant.

IN CHARGE.

287 I.A. 613

MR. JUSTICE SCHEMME DELIVERED THE OPINION OF THE COURT.

The plaintiff sued the defendant in the Municipal Court of Chicago in an action of the tort of negligence. The cause was admitted to the court, the issues were found against the defendant, and the plaintiff's damages were assessed at the sum of \$1,318.92. Judgment was entered upon the finding and the defendant has appealed. That the plaintiff delivered the goods in question to one J. Weston is not disputed, and the claim against the defendant is based upon the theory that "the defendant, both before and after the delivery of the furniture, directly promised to pay for the same but failed to do so," and "that J. Weston was the agent of the defendant for the purpose of receiving the merchandise." The defendant's answer admitted liability of certain articles asserted: "(1) That the defendant did not purchase the goods, etc.; (2) that the defendant did not receive the goods, etc.; (3) that the goods, etc., were not sold or delivered to the defendant at his special instance and request; (4) that the goods, etc., were of a value exceeding \$500 and that no part of them were delivered to an auctioneer by the defendant, that there was no any memorandum or note in writing signed by the defendant or by any person authorized by him, and that the defendant or any person authorized by him did not give writing in writing to bind the contract, etc.; and (5) that the defendant was not indebted to the plaintiff in any

wife went to the store of the plaintiff and selected the furniture in question and ordered it delivered to J. Newton, 360 Oakwood Boulevard. Newton was the former husband of the defendant's wife, and the undisputed evidence shows that she had purposely absented herself from the home of the defendant from January 5, 1931, until March 17, 1931. The plaintiff introduced evidence tending to show that the defendant, in a telephone conversation with one of plaintiff's employees, authorized and directed the plaintiff to sell the furniture to his wife and also authorized the delivery of the furniture to the Newton residence, and that after the purchase the defendant promised the plaintiff that he would pay for the goods. The defendant's testimony tended to prove that he did not, by telephone or otherwise, authorize the plaintiff to sell the furniture to his wife and that he did not direct the delivery of the furniture to Newton; that he did not at any time promise to pay for the furniture, and that the first time he heard of the alleged sale was on April 6 or 7 and that upon learning of the sale he immediately protested that the same was made without his authority or consent. The case of the plaintiff depends largely upon alleged telephone conversations with the defendant, all of which were denied by the latter.

that

In the view we have taken of this appeal it is necessary to determine only one of the assignments of error urged by the defendant. The defendant strenuously contends that the trial judge, under the evidence, should have found for the defendant. After a very careful consideration of the evidence, including certain important exhibits, we have reached the conclusion that this contention is a meritorious one. In our opinion there are several undisputed circumstances in this case that are very difficult to reconcile with the claim of plaintiff.

wife went to the store at the plaintiff's and selected the furniture in question and ordered it delivered to J. Newton, who delivered. However, Newton was the former husband of the defendant's wife, and the undisputed evidence shows that she had purposely absented herself from the home of the defendant from January 2, 1931, until March 14, 1931. The plaintiff introduced evidence tending to show that the defendant, in a telephone conversation with one of plaintiff's employees, authorized and directed the plaintiff to sell the furniture to his wife and also authorized the delivery of the furniture to the Newton residence, and that after the purchase the defendant promised the plaintiff that he would pay for the goods. The defendant's testimony tended to prove that he did not, by telephone or otherwise, authorize the plaintiff to sell the furniture to his wife and that he did not direct the delivery of the furniture to Newton; that he did not at any time promise to pay for the furniture, and that the first time he heard of the alleged sale was on April 6 or 7 and that upon learning of the sale he immediately protested that the same was made without his authority or consent. The case of the plaintiff depends largely upon alleged telephone conversations with the defendant, all of which were denied by the latter.

In the view ^{that} we have taken of this appeal it is necessary to determine only one of the assignments of error urged by the defendant. The defendant strenuously contends that the trial judge, under the evidence, should have found for the defendant. After a very careful consideration of the evidence, including certain important exhibits, we have reached the conclusion that this contention is a meritless one. In our opinion there are several undisputed circumstances in this case that are very difficult to reconcile with the claim of plaintiff.

Each party to this cause has devoted a considerable part of his brief to the question as to whether the trial court erred in the admission of certain alleged telephone conversations with the defendant, and for the guidance of the trial court in any future trial of this cause we may say that the law of this state on the subject of telephone conversations is very clear. (See Gedair v. Ham Nat'l Bank, 225 Ill. 572; The People v. Fowloski, 311 Ill. 284, 287; In re Est. of Wood v. Tyler, 255 Ill. App. 401, 412; Chicago Smelting & Refining Corp. v. Sullivan, 246 Ill. App. 538, 543.)

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Kerner, J.P., and Gridley, J., concur.

35771

GENERAL ACCEPTANCE COMPANY,
a corporation,
Appellant,

v.

MELISSA McNALLY,
Appellee.

74 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 613^s

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

From a judgment entered in favor of the defendant, Melissa McNally, and against the plaintiff, for costs, the plaintiff has appealed.

The plaintiff's verified statement of claim alleges "that the defendant is indebted to it in the sum of \$719.80 upon one certain principal promissory note dated January 19th, 1929, payable to the order of Ashland Lumber Company, and by it endorsed to this plaintiff for a good and valuable consideration and before maturity; * * *, that said note was signed by the defendant as 'J. C. McNally,' but that the true and correct name of the said defendant is Melissa McNally; * * * that although it has often demanded payment of said amount from the defendant, she has failed and refused so to do, * * * and therefore prays that judgment be entered for * * * \$824.20," etc. The defendant's affidavit of merits states that "the defense of the defendant to said suit is as follows: That said defendant is not indebted to the plaintiff herein in the sum of \$719.80 on account of promissory note; * * * denies that she signed said note as J. C. McNally and alleges that her true and correct marriage name is Mrs. J. C. McNally; * * * ^{states} that said note does not bear her

10077

RECEIVED AT THE COURT OF CHANCERY
IN THE CITY OF NEW YORK
ON THE 10TH DAY OF JANUARY 1908

7

WILLIAM KELLER,
Plaintiff,

vs.
J. C. KELLER,
Defendant.

From a judgment entered in favor of the defendant,
William Keller, and against the plaintiff, for costs, the
plaintiff has appealed.

The plaintiff's verified statement of claim alleges

"that the defendant is indebted to it in the sum of \$719.80

and was at the time of the filing of this statement

1908, payable to the order of William Keller, and by it
endorsed to this plaintiff for a good and valuable consideration

and before maturity; * * * that said note was signed by the

defendant as 'J. C. Keller,' and that the true and correct name

of the said defendant is William Keller; * * * that although

it has often demanded payment of said amount from the defendant,

and has failed and refused so to do, * * * and therefore prays

that judgment be entered for * * * \$719.80, etc. The defendant's

affidavit of merits states that "the defense of the defendant to

said suit is as follows: That said statement is not indebted

to the plaintiff herein in the sum of \$719.80 on account of

promissory note; * * * denies that she signed said note as

J. C. Keller, and alleges that her true and correct name is

W. C. Keller; * * * that said note does not bear her

signature; * * * that said note has been materially changed and altered by additional name of Mrs. J. C. McNally, which is not her signature and which was placed there without her knowledge and consent, and is a forgery; that J. C. McNally never authorized, directed or ratified that his name be signed to said note and that said note does not bear his signature; that the name 'J. C. McNally' was written on said note by this defendant, at the request, direction and demand of the salesman of the Ashland Lumber Company, but not as her signature; * * * denies that she is indebted to plaintiff herein on alleged promissory note or on account of attorney's fees claimed." A jury was waived and the cause was submitted to the court. The note sued upon reads as follows:

"719.80

Chicago, Illinois, January 19, 1929

For Value Received, I we promise to pay to the order of Ashland Lumber Company Seven Hundred Nineteen and 80/100 Dollars, in installments as follows:

| | | | |
|-----------------------------|---------|-------------------------|---------|
| One mo. after date | \$30.03 | Nine mo. after date | \$29.99 |
| Two mo. after date | 29.99 | Ten mo. after date | 29.99 |
| Three mo. after date | 29.99 | Eleven mo. after date | 29.99 |
| Four mo. after date | 29.99 | Twelve mo. after date | 29.99 |
| Five mo. after date | 29.99 | Thirteen mo. after date | 29.99 |
| Six mo. after date | 29.99 | Fourteen mo. after date | 29.99 |
| Seven mo. after date | 29.99 | Fifteen mo. after date | 29.99 |
| Seventeen mo. after date | | | \$29.99 |
| Eighteen mo. after date | | | 29.99 |
| Nineteen mo. after date | | | 29.99 |
| Twenty mo. after date | | | 29.99 |
| Twenty-one mo. after date | | | 29.99 |
| Twenty-three mo. after date | | | 29.99 |
| Twenty-four mo. after date | | | 29.99 |

at the office of General Acceptance Company, 139 North Clark Street, Chicago, Ill., with interest after maturity by lapse of time or otherwise on the amount of the principal hereof at the highest rate now provided by law.

In the event that there shall be a default in the payment of any installment of principal, the entire amount of principal shall at the option of the holder hereof, immediately, without notice, become due and payable.

(Here follows a cognovit in the usual form.)

Mailing

Address

City

5271 Northwest Highway

Chicago, Illinois

(Sign here) J. C. McNally

(Sign here) Mrs. J. McNally"

signature? * * * that said note has been materially changed and
 altered by additional name of Mrs. J. C. McElroy, which is not her
 signature and which was placed there without her knowledge and
 consent, and is a forgery; that J. C. McElroy never authorized,
 directed or permitted that his name be signed to said note and that
 said note has not been his signature; that the name 'J. C. McElroy'
 was written on said note by this defendant, at the request, direction
 and demand of the managers of the National Lumber Company, but not as
 her signature; * * * denies that she is indebted to National Lumber
 as alleged; denies said note as an account of company's loan claim.
 A jury was sworn and the cause was submitted to the court. The note
 used upon which as follows:

"\$15.00 Chicago, Illinois, January 1st, 1904

The Value Received, I do promise to pay to the order of National
 Lumber Company, or its assigns, the sum of Fifteen Dollars, in lawful
 money as follows:

| | | | |
|-----------------------------|---------|----------------------------|---------|
| One mo. after date | \$20.00 | Nine mo. after date | \$20.00 |
| Two mo. after date | 20.00 | Ten mo. after date | 20.00 |
| Three mo. after date | 20.00 | Eleven mo. after date | 20.00 |
| Four mo. after date | 20.00 | Twelve mo. after date | 20.00 |
| Five mo. after date | 20.00 | Thirteen mo. after date | 20.00 |
| Six mo. after date | 20.00 | Fourteen mo. after date | 20.00 |
| Seven mo. after date | 20.00 | Fifteen mo. after date | 20.00 |
| Eight mo. after date | 20.00 | Sixteen mo. after date | 20.00 |
| Nineteen mo. after date | 20.00 | Twenty mo. after date | 20.00 |
| Twenty-one mo. after date | 20.00 | Twenty-two mo. after date | 20.00 |
| Twenty-three mo. after date | 20.00 | Twenty-four mo. after date | 20.00 |

At the office of National Lumber Company, 200 North Dear Street,
 Chicago, Ill., with interest after maturity by issue of note at
 expiration on the amount of the principal noted at the highest rate
 now provided by law.

In the event said note shall be a loan in the payment of any
 installment of principal, the entire amount of principal shall be the
 option of the holder hereafter, immediately, without notice, become due
 and payable.

(Note follows a copy in the usual form.)

On the back of the note appears the following:

"Without Recourse, Pay to the Order of General Acceptance
Company

Ashland Lumber Company
By Sidney C. Masser
Pres."

The defendant, called as a witness by the plaintiff under section 33 of the Municipal Court Act, testified, in substance, that her name was Melissa McNally; that she was the wife of James C. McNally and resided at 5271 Northwest Highway, Chicago; that she signed the name J. C. McNally on the note in question, and that she signed the name J. C. McNally to a statement of completion and acknowledgment, dated January 19, 1929, and addressed to the plaintiff. This statement, which was received in evidence, notified the plaintiff

" * * * That the improvement to real estate known as 5271 Northwest Highway, Chicago, Illinois, was satisfactorily completed on January 19th, 1929, by Ashland Lumber Company, in accordance with the contract between us dated January 5th, 1929.

This statement is made to induce you to pay to the contractor the purchase price for my our note and contract.

I we have paid contractor the first installment of \$100.00 and having received notice of the assignment of contract to you, and the negotiation of my our note to you, hereby agree to pay the balance of \$719.80 due on note, direct to you at your office, in installments of \$29.99 on the 19th day of each month commencing February 19th, 1929, until the full amount has been paid.

I we hereby authorize you to act as my our agent in my our behalf in securing contractor's statement under mechanic's lien act.

Yours truly,
(Sign here) J. C. McNally
(Owner)

(Sign here) Mrs. J. McNally"
(Owner)

Harold Stern testified that the plaintiff's business was the buying of commercial paper; that it purchased the note in question from the Ashland Lumber Company on January 20, 1929, that it was received on that date by the witness, who was in charge of plaintiff's office, and that the note, when he received it, bore the signatures "J. C.

On the basis of the above evidence the following
"Without prejudice, but to the Order of General Sessions
Court."

Witness my hand and
seal this 1st day of
January, 1909.

The following, which is a statement by the Plaintiff under
oath of the Municipal Court, is submitted,
that her name was William McElroy; that she was the wife of James
C. McElroy and resided at 8721 Northwest Highway, Chicago; that she
signed the note J. C. McElroy on the note in question, and that she
signed the name J. C. McElroy to a statement of acquisition and
redemption, dated January 15, 1909, and submitted to the Court.
This statement, which was received in evidence, recited

the Plaintiff

"I, J. C. McElroy, do hereby certify that I am the
owner of the property described in the foregoing
statement, and that I am the owner of the property
described in the foregoing statement, and that I am the
owner of the property described in the foregoing statement."

This statement is made in answer to the
interrogatories made by the Court and is true.

I am now residing at the residence of J. C. McElroy, 8721
Northwest Highway, Chicago, Illinois, and I am the
owner of the property described in the foregoing
statement, and I am the owner of the property
described in the foregoing statement, and I am the
owner of the property described in the foregoing statement."

I am hereby submitting this statement to the Court
as evidence in support of my claim, and I am
submitting it as evidence in support of my claim.

James C. McElroy
(Plaintiff)
(Signed)

(Signed) James C. McElroy
(Plaintiff)

It is further certified that the Plaintiff's statement was the basis
of the Court's decision that it purchased the note in question from the
National Trust Company on January 20, 1909, that it was received on
that date by the witness, who was in charge of Plaintiff's office.

McNally" and "Mrs. J. McNally;" that on the same date the witness also received the aforesaid statement of completion and acknowledgment; that after the purchase of the note the witness discovered that the defendant did not sign the name Mrs. J. McNally on the note; that no payments on account of the note were made and that he personally notified J. C. McNally and Mrs. J. McNally that plaintiff had purchased the note and requested that payments on account of the same be made at plaintiff's office. The defendant testified in her own behalf as follows: That she made a contract with the Ashland Lumber Company to erect a porch on her residence, which belonged to her and her husband; that H. N. Strand, an agent of Ashland Lumber Company in charge of the work, came to her residence on January 19, 1929, and submitted to her the note in question and also the aforesaid statement of completion and acknowledgment, and asked her to sign her husband's name to these papers; that she signed the name J. C. McNally on both papers at the request of Strand and in his presence; that she did not sign the name Mrs. J. McNally on the note; that the signature Mrs. J. McNally did not appear on either of the papers when she delivered them to Mr. Strand, and that she signed the name J. C. McNally on the original contract made with Ashland Lumber Company. Strand, called in rebuttal by the plaintiff, testified that he was employed by the Lumber Company during January, 1929; that on the 19th day of that month he called at the defendant's residence, 5271 Northwest Highway, Chicago, to receive the note and statement of completion and acknowledgment, which instruments had been previously delivered to the defendant by the man in charge of the construction work, and to collect the \$100 first payment due when the job was completed; that he examined the premises and found that the job had been completed; that the

McKellip" and "Mrs. J. McKellip" that on the same date the witness also received the witness' statement of completion and acknowledgment of the note; that after the purchase of the note the witness discovered that the defendant did not sign the name Mrs. J. McKellip on the note; that no payments on account of the note were made and that he had purchased the note and requested that payments on account of the note be made at plaintiff's office. The defendant testified in her own behalf as follows: That she made a contract with the Lumber Company to erect a porch on her residence, which belonged to her and her husband; that H. W. Brown, an agent of Lumber Company in charge of the work, came to her residence on January 19, 1929, and submitted to her the note in question and also the above said statement of completion and acknowledgment, and asked her to sign her husband's name to these papers; that she signed the name J. W. McKellip on both papers at the request of Brown and in his presence; that she did not sign the name Mrs. J. McKellip on the note; that the signature Mrs. J. McKellip did not appear on either of the papers when she delivered them to H. W. Brown, and that she signed the name J. W. McKellip on the original contract with Lumber Company. Brown, who is testified by the plaintiff, testified that he was employed by the Lumber Company until January, 1929; that on the 19th day of that month he called at the defendant's residence and delivered to her the note in question, in return for the note and statement of completion and acknowledgment, which statements had been previously delivered to the defendant by the man in charge of the construction work, and he called the day that payment due when the job was completed; that he examined the papers and found that the job had been completed; that the

defendant then complained of the electrical work and he allowed a credit of \$40 on account of that work and for that reason he accepted \$60 instead of \$100 as the first payment; that the defendant then delivered to him the note and statement of completion and acknowledgment and he then delivered the same to Ashland Lumber Company; that the note and statement of completion and acknowledgment were in the same condition as they were at the time he received them, with the exception of the indorsement on the back of the note; that he did not request the defendant to sign the papers "J. C. McNally." The witness further stated that he was no longer connected with the plaintiff company and that he was engaged in the general contracting business for himself. No further testimony was offered by either side.

The plaintiff contends that the finding and judgment of the court are contrary to the evidence and the law. We are satisfied that this contention is a meritorious one and we are unable to understand upon what theory the trial court predicated his finding. Neither in the defendant's pleading nor in her evidence is there any denial that the plaintiff was the holder of the note in question in due course. There are no facts or circumstances in the case from which a fair and reasonable inference might be reasonably drawn that the plaintiff is not a holder in due course. The Negotiable Instruments act defines a holder in due course as one who takes the instrument under the following conditions: "1. That the instrument is complete and regular upon its face. 2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument

defendant then complained of the electrical work and he allowed a check of \$40 on account of that work and for the balance he accepted the check of \$100 on the same payment; that the defendant then delivered to him the note and statement of completion and statement of work and he then delivered the same to the defendant Company; that the note and statement of completion and statement of work were in the same condition as they were at the time he received them; with the exception of the statement on the back of the note; that he did not request the defendant to sign the paper "S. S. McNelly". The witness further stated that he was no longer connected with the plaintiff company and that he was engaged in the general contracting business for himself. He further testified was offered by either side.

The plaintiff contends that the finding and judgment of the court are contrary to the evidence and the law. He has nothing to say that this contention is a mere speculation and we are unable to understand upon what theory the trial court granted his finding. Neither in the defendant's pleading nor in her evidence is there any denial that the plaintiff was the holder of the note in question at the time. There are no facts or circumstances in the case from which a jury could reasonably infer that the plaintiff was not the holder in the case. The defendant's instruments are not before a holder in the case as one who takes the instrument under the following conditions: "1. That the instrument is complete and regular upon its face. 2. That he becomes the holder of it before it was overdue, and without notice that it was then previously dishonored, it must be the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument

or defect in the title of the person negotiating it." The note in question is an ordinary promissory note in the usual form. There is nothing on the face of the instrument to arouse suspicion or to raise a question in the mind of the taker of any defect in the title of the Ashland Lumber Company or of its right to negotiate it. "Only bad faith will defeat the title of the endorsee of commercial paper taken before maturity, for value and without knowledge of any defense thereto. Mere suspicion, the knowledge of circumstances calculated to excite suspicion, or even gross negligence of the endorsee in acquiring the paper, will not defeat his title." (Kavanagh v. Bank of America, 239 Ill. 404, 408.)

The defendant not only admits that she signed the name J. C. McNally to the note, but she admits that she signed the same name to the contract for the erection of the porch, for which the note was given, and also to the statement of completion of the contract. She makes no claim that she did not understand the nature and contents of the note and the statement of completion. The contention of the defendant that J. C. McNally is not her correct name, and that her husband, J. C. McNally, never authorized, directed or ratified that his name be signed to the note and that therefore the name J. C. McNally cannot be considered as her signature to the note, is without the slightest merit and is a flimsy pretext to escape legal responsibility. She admits that she owned, with her husband, the premises in question, and that she signed the contract for the erection of the porch and also the statement of the completion of the contract, addressed to the plaintiff, as "J. C. McNally." Section 18, par. 38, of the Negotiable Instruments act provides that where one signs an assumed name he will be liable to the same extent as if he had signed his own name. If it were necessary many cases might be cited that have followed this well known principle of law. The

or dated in the title of the person negotiating it." The note
is entitled to be evidence of the debt in the same manner.
There is nothing on the face of the instrument to suggest suspicion
of its being a question in the mind of the holder as to its validity
the title of the instrument is sufficient to show that it is negotiable
it. "Only the title will show the title of the negotiable
commercial paper which is negotiable, the title and content
being the same. It is not necessary to show the title, the content
of the instrument is sufficient to show its negotiability, it is not
sufficient to show the content in negotiating the paper, it is not
the title." (Harris v. Harris, 111 Ill. 404, 405.)
The defendant not only admits that she signed the note as J. C. Kennedy
to the note, but she admits that she signed the name as the
contract for the execution of the paper, for which the note was given,
and also as the statement of completion of the contract. She makes
no claim that she did not understand the nature and contents of the
note and the statement of completion. The completion of the
statement that J. C. Kennedy is not her correct name, and that her
husband, J. C. Kennedy, never authorized, directed or ratified that
his name be signed to the note and that therefore the name J. C.
Kennedy cannot be considered as her signature to the note, is without
the slightest merit and is a direct attempt to escape liability.
Irresponsibility. The note is signed and dated with her husband, she
remains in question, and she signed the contract for the
completion of the paper and also the statement of the completion of the
contract, according to the plaintiff, as "J. C. Kennedy". Section
11, par. 38, of the Negotiable Instruments Act provides that where
any name is written thereon it will be prima facie the name of the
person who signed it and there. It is not necessary to show that

defendant's argument that the note was materially changed and altered by the addition of the name Mrs. J. McNally, which was placed there without her knowledge and consent and is a forgery, and that therefore the note is wholly inoperative, is also without the slightest merit. If we disregard entirely the testimony of Harold Stern that this name was upon the note when he received it from the defendant, still there is not the slightest evidence in the case to indicate that the plaintiff placed ^{upon} the note the name Mrs. J. McNally, or that it had any knowledge, prior to the time that it purchased the note, that it was placed there without the consent or knowledge of the defendant. Section 123, par. 145, of the Negotiable Instruments act provides: "But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

Under the pleadings, the undisputed evidence and the law, the trial court should have made a finding for the plaintiff for the amount due under the terms of the note. As the case was tried by the court, without a jury, we will not remand the cause but will enter judgment here. Accordingly, the judgment of the Municipal court of Chicago is reversed and judgment will be entered here, with findings of fact, against the defendant, Melissa McNally, for \$719.80, together with seven per cent interest thereon from February 19, 1929, which amount of interest the clerk will compute.

REVERSED WITH FINDINGS OF FACT AND JUDGMENT HERE
AGAINST THE DEFENDANT FOR \$719.80, TOGETHER WITH
SEVEN PER CENT INTEREST FROM FEBRUARY 19, 1929.

Kerner, P. J., and Gridley, J., concur.

(over)

[illegible]

35771

FINDINGS OF FACT.

We find as ultimate facts in this case that the defendant Melissa McNally, under the name of J. C. McNally, for a valuable consideration ^{and} as her own undertaking, signed and executed the note sued upon and delivered the same to Ashland Lumber Company; that the said Company, for a valuable consideration and before maturity, indorsed and delivered said note to the plaintiff; that the latter is a holder in due course of the note; that the plaintiff has often demanded payment of the note from the defendant, but the latter has failed and refused to pay the note or any part thereof, and that defendant is justly indebted to the plaintiff in the sum of \$719.80, together with interest thereon at the rate of seven per cent per annum from February 19, 1929.

WITNESS OF FACT.

At this an affidavit taken is this case that the
defendant William McElroy, known the name of J. J. McElroy, for
a valuable consideration ^{and} has been indebted, signed and
executed the note and upon and delivered the same to plaintiff
plaintiff company; that the said company, for a valuable consideration
and before maturity, indorsed and delivered said note to the plain-
tiff; that the latter is a holder in due course of the note; that
the plaintiff has often demanded payment of the note from the
defendant, but the latter has failed and refused to pay the note
or any part thereof, and that defendant is justly indebted to the
plaintiff in the sum of \$10.00, together with interest thereon
at the rate of seven per cent per annum from February 1st, 1908.

35792

H. M. BYLESBY & COMPANY,
a corporation,

Appellant,

v.

WILMER C. BRENNETT,

Appellee.

75 7
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

267 I.A. 613⁴

MR. JUSTICE MCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff sued the defendant, in the Municipal court of Chicago, in an action of the first class. There was a trial before the court, with a jury, and a verdict returned finding the issues against the defendant and assessing the plaintiff's damages at the sum of \$179.30. The plaintiff's motion for a new trial was overruled and judgment was entered upon the verdict. This appeal followed.

The plaintiff's statement of claim alleges that "on or about the 25th day of October, 1929, the plaintiff being then and there a duly authorized dealer and broker in stocks, bonds and securities, the defendant employed and requested the plaintiff to purchase for him one hundred (100) shares of the Common Stock of Utility & Industrial Corporation at a price of \$31.50 per share. Thereupon, on said 25th day of October, 1929, the plaintiff purchased said stock and paid the said purchase price of \$3,150.00 therefor, and certificates representing said stock were delivered to the plaintiff. The plaintiff purchased said stock through a member of the Chicago Stock Exchange and paid to said member the sum of \$15.00 as commissions on the purchase of said stock. The said stock was delivered to the plaintiff and paid for by it and it has ever

H. E. KILPATRICK & COMPANY
A CORPORATION
CHICAGO, ILL.

v.

WILLIAM O. BURNETT,
Appellee.

CHIEF OF CHARGE
CHARGE OF CHARGE

867 I.A. 613

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

The plaintiff and the defendant, in the plaintiff's count of Chicago, in an action of the first class. There was a trial before the court, with a jury, and a verdict returned against the plaintiff and against the defendant and against the plaintiff's assigns for the sum of \$175.00. The plaintiff's motion for a new trial was overruled and judgment was entered upon the verdict. This appeal followed.

The plaintiff's statement of claim alleges that "on or about the 28th day of October, 1927, the plaintiff being then and there a duly authorized dealer and broker in stocks, bonds and securities, the defendant employed and requested the plaintiff to purchase for him one hundred (100) shares of the common stock of Valley & International Corporation at a price of \$1.75 per share. Thereupon, on said 28th day of October, 1927, the plaintiff purchased said stock and sold the said purchase price of \$175.00 interest, and a certified representative said stock was delivered to the plaintiff. The plaintiff purchased said stock through a certain of the Chicago stock exchange and paid to said member the sum of \$175.00 as commission on the purchase of said stock. The said stock was delivered to the plaintiff and sold for \$1.75 per share.

since held said stock and has been and is now ready, able and willing to deliver said stock to the defendant upon the repayment to it of the moneys advanced by it in the purchase of said stock. The plaintiff notified the defendant of the purchase of said stock by it for him and requested the defendant to repay to the plaintiff the moneys it had advanced in the purchase of said stock and to accept delivery of said stock. That on or about the 5th day of November, 1929, the defendant did pay to the plaintiff the sum of \$152.00 on account of the moneys due the plaintiff as above set forth, but that though often requested by the plaintiff to do so, the defendant has neglected ^{and} refused and does now neglect and refuse to accept the said stock purchased for the defendant by the plaintiff as above set forth or to pay to the plaintiff the balance of \$3,013.00 due to the plaintiff as above set forth or any part thereof, to the damage of the plaintiff in the sum of \$4,000.00, wherefore it brings this suit."

The defendant's affidavit of merits avers "that on or about the 24th day of October, 1929, defendant directed plaintiff by its agent, one Harry B. Hamilton, to purchase 100 shares of the common stock of the Utility & Industrial Corporation at a price not to exceed \$32.00 per share; that forthwith thereafter, to-wit; approximately one-half hour later, defendant ordered, directed and instructed plaintiff, through its said agent, Harry B. Hamilton, to cancel said order, or if said order had been executed, to resell said stock forthwith at the market, which said order of direction and instruction plaintiff then and there agreed to perform and carry on; that at the time said order and direction to sell was accepted by plaintiff, said stock was selling on the market at a price in excess of, to-wit, \$30.00 per share; * * * that subsequently thereto, on, to-wit, the 28th day of October, he received a statement from plaintiff notifying him that it had purchased 100 shares of said

since said stock had been and is now being sold and willing
to deliver said stock to the defendant upon the payment to it of
the money advanced by it in the purchase of said stock. The plain-
tiff notified the defendant of the purchase of said stock by it for
him and requested the defendant to repay to the plaintiff the money
it had advanced in the purchase of said stock and to accept delivery
of said stock. Then on or about the 31st day of November, 1932, the
defendant did pay to the plaintiff the sum of \$182.00 on account of
the money due the plaintiff as above set forth, but that through often
requested by the plaintiff to do so, the defendant has neglected and
refused and does now neglect and refuse to accept the said stock pur-
chased for the defendant by the plaintiff as above set forth or to pay
to the plaintiff the balance of \$5,913.00 due to the plaintiff as above
set forth on any part thereof, to the damage of the plaintiff in the
sum of \$6,095.00, wherefore it prays this writ.

The defendant's affidavit of merits reads "that on or

about the 24th day of October, 1932, defendant directed plaintiff
by its agent, one Harry B. Hamilton, to purchase 100 shares of the
common stock of the Wellly & Industrial Corporation at a price not
to exceed \$12.00 per share; that plaintiff immediately, directly and
indirectly, through its said agent, Harry B. Hamilton,
to whom said order, or its said order had been executed, so usually
said stock furnished at the market, which said order of direction
and instruction plaintiff then and there agreed to perform and carry
out and that at the time said order and direction so well was accepted
by plaintiff, said stock was selling on the market at a price in
excess of, to-wit, \$30.00 per share; * * * that subsequently thereto,
on, to-wit, the 28th day of October, he received a statement from

stock at \$31.50 per share; that thereupon forthwith defendant notified plaintiff that he had previously on, to-wit, the 24th day of October, 1929, ordered and directed them to sell said stock at the market if the same had been purchased on his account; that plaintiff thereupon by its said agent, Harry B. Hamilton, advised defendant that he had not placed said sale order as directed by reason of the fact that the market had fallen off on said 24th day of October, 1929, and he thought the loss would be excessive; that defendant thereupon notified plaintiff that he would hold him responsible for failure to execute his said order to sell; * * * that during the period in question, to-wit, October 25, 1929, defendant was a customer of plaintiff and carried on numerous transactions with plaintiff; that thereafter on, to-wit, the 5th day of November, 1929, defendant delivered dividend checks on miscellaneous stocks, totaling the sum of \$152.00, to plaintiff to be applied upon his general account; that defendant at no time received said shares of Utility & Industrial Corporation stock, nor did plaintiff render him any statement in connection therewith for a long period of time, to-wit, six months; * * * that he is informed and verily believes that plaintiff at no time made purchase of said stock on the open market, but on the contrary that plaintiff held a large block of said stock as the owner thereof and that plaintiff ignored the instructions given it by defendant aforesaid, thereby intending to force and compel defendant to carry said stock during a depressed period of the market and/or until such time as it could be determined whether or not a profit or a loss would be sustained therein. Wherefore affiant denies that plaintiff purchased said stock through a member of the Chicago Stock Exchange and paid therefor the commissions as alleged and/or the sum of \$3,150.00.

stock at \$21.50 per share; that defendant furnished defendant
with a statement dated 10-10-33, to-wit: the date
of October, 1933, signed and attested that he sold said stock
at the market at the time and place mentioned in his account; that
plaintiff's statement to the effect that, "I sold said stock
defendant that he had not placed said order as directed by
order of the fact that the market had fallen off on said 10th day
of October, 1933, and he thought the loss would be excessive; that
defendant's statement to-wit: "I sold said stock at
responsible for failing to execute his said order as follows: * *
that during the period of October, 1933, to-wit: October 10, 1933,
defendant was a member of plaintiff and carried on numerous
transactions with plaintiff; that thereafter on, to-wit: the 11th
day of November, 1933, defendant's interest in the same was
voluntarily stock, totaling the sum of \$125.00, to plaintiff to be
applied upon the general account; that defendant at no time received
said shares of Utility & Industrial Corporation stock, nor did
plaintiff render him any statement in connection therewith for a
long period of time, to-wit: six months; * * that he is informed
and verily believes that plaintiff at no time made purchase of said
stock on the open market, but on the contrary that plaintiff held
a large block of said stock at the same time and that plaintiff
ignored the instructions given to by defendant otherwise, thereby
intending to keep and control defendant to carry said stock during
a depressed period of the market and/or until such time as it could
be determined whether or not a profit or a loss would be realized
therein. Therefore plaintiff's statement that plaintiff purchased said
stock through a member of the Chicago Stock Exchange was false
therefor the commission as alleged and/or the sum of \$2,500.00

Affiant further denies that defendant paid to plaintiff the said sum of \$152.00 on account of moneys due plaintiff by reason of the transaction in question and states that defendant is not indebted to the plaintiff in any sum or sums whatsoever."

In the view that we have taken of this appeal it is necessary for us to consider only one of the many points urged by the plaintiff in support of its contention that the judgment should be reversed. The plaintiff contends, and strenuously argues, that the verdict is against the manifest weight of the evidence. After a careful reading of the entire evidence we have reached the conclusion that this contention is clearly a meritorious one. As we study the facts and circumstances of this case, it is difficult for us to understand the verdict of the jury. As the case may be tried again we refrain from analyzing and commenting upon the facts and circumstances in evidence.

The judgment of the Municipal court of Chicago will be reversed and the cause will be remanded.

REVERSED AND REMANDED.

Kerner, P. J., and Gridley, J., concur.

Attorney General advised that the Government was not in a position to prosecute the case of the plaintiff by reason of the fact that the plaintiff is not in the possession of the evidence in question and states that the Government is not in a position to prosecute the case.

In the first place we have taken at this point it is necessary for us to consider only one of the many points raised by the plaintiff in support of her contention that the judgment should be reversed. The plaintiff contends, and apparently states, that the verdict is against the manifest weight of the evidence. After a careful reading of the entire evidence we have reached the conclusion that this contention is clearly a misstatement and, in fact, the fact and circumstances of this case, it is difficult for us to understand the verdict of the jury. As the case may be tried again we return to our analysis and commenting upon the facts and circumstances in evidence.

The judgment of the United States Court of Appeals will be reversed and the cause will be remanded.

REVEREND AND HONORABLE,

THE JURY, P. J. and GRADY, J., CONCUR.

35801

NATIONAL BOX COMPANY,
a Corporation, Appellee,

vs.

BIG BEN BEVERAGE CORPORATION,
a Corporation, Appellant.

76
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 614¹

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

In the instant case the trial court instructed the jury to find the issues against the defendant and to assess the plaintiff's damages at the sum of \$1,500. Judgment was entered upon the verdict and the defendant has appealed.

Plaintiff's amended statement of claim alleges that "plaintiff's claim is in the sum of \$1,500, which sum is for divers goods, wares and merchandise sold and delivered to the defendant, at its special instant and request, and for which the defendant agreed to pay. That the said goods, wares and merchandise were sold and delivered to the defendant over a period of from to-wit March 15, 1929 to November 1, 1929. That there is now due and owing the plaintiff from the defendant, the sum of \$1,500 for monies had and received for divers goods, wares and merchandise sold and delivered, for labor and services of the plaintiff and for work and materials furnished by the plaintiff, all at the special instant and request of the defendant, and for which the defendant promised to pay. Yet the defendant though often requested has not paid the same or any part thereof to the plaintiff, but refuses so to do to the damage of the plaintiff in the sum of \$1,500." Following the statement of claim, and upon the same page, on a printed form prescribed by the Municipal court, appears the affidavit of plaintiff's claim, which contains, inter alia, the following: "O. E. Bartos, being first duly sworn, on oath states that he is the Secretary of plaintiffs in above entitled cause; that he has knowledge of the facts that said cause

RECEIVED FOR DEPT. OF JUSTICE
FEBRUARY 19, 1934

RECEIVED

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U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

RECEIVED

U.S. DEPARTMENT OF JUSTICE

RECEIVED

RE. JUDITH ROSEMAN BELMONT AND OTHERS OF THE COUNTY.

In the instant case the trial court awarded the jury to find the issues against the defendant and to assess the plaintiff's damages at the sum of \$1,000. Judgment was entered upon the verdict and the defendant has appealed.

Plaintiff's amended statement of claim alleges that "Plaintiff's claim is in the sum of \$1,000, which sum is for diverse goods, wares and merchandise sold and delivered to the defendant, at its special instance and request, and for which the defendant failed to pay. That the said goods, wares and merchandise were sold and delivered to the defendant over a period of time extending from the 1st day of November, 1933, to the 31st day of December, 1933. That there is now due and owing the plaintiff from the defendant, the sum of \$1,000 for monies due and received for diverse goods, wares and merchandise sold and delivered, for labor and services of the plaintiff and for work and materials furnished by the plaintiff, all of the several invoices and requests of the defendant, and for which the defendant promised to pay. That the defendant though often requested has not paid the sum of any part thereof to the plaintiff, the balance as to the balance of the plaintiff in the sum of \$1,000. Following the statement of claim, and upon the same page, on a related form prescribed by the municipal court, appears the affidavit of plaintiff's claim, which contains, inter alia, the following: "J. E. Hanson, being first sworn, on oath states that he is the Secretary of plaintiff in above

the defendant, and for which the defendant promised to pay. That the defendant though often requested has not paid the sum of any part thereof to the plaintiff, the balance as to the balance of the plaintiff in the sum of \$1,000. Following the statement of claim, and upon the same page, on a related form prescribed by the municipal court, appears the affidavit of plaintiff's claim, which contains, inter alia, the following: "J. E. Hanson, being first sworn, on oath states that he is the Secretary of plaintiff in above

is a suit for the recovery of money only; that the nature of plaintiff's demand is as stated and that there is due to plaintiff from the defendant after allowing to defendant all just credits, deductions and set-offs the sum of Fifteen Hundred dollars and No cents (\$1500.00) G. E. Bartos Subscribed and sworn to before me this 28th day of October 1930 C. L. French Notary Public (Seal)."

The defendant's affidavit of merits contains the following: "Affiant further states that the defense of the defendant to said suit is as follows: Affiant admits that the defendant purchased goods, wares or merchandise from the plaintiff herein and that the same was delivered during the period set forth in the plaintiff's statement of claim. Affiant further states that the goods, wares and merchandise consisted of boxes and were defective and split when the bottles of the defendant corporation were placed in the same, the said boxes having been ordered for the specific purpose of being used as containers for bottles. That of the total number of boxes delivered to the defendant herein, 3,125 boxes were of the kind and quality as originally ordered and could be used for the purpose intended. Defendant further states that the price per box was the sum of 32¢ and that the defendant, in payment for the said boxes, delivered to the plaintiff herein the two notes totalling the sum of One Thousand Dollars; *** that immediately upon receipt of the merchandise, the defendant notified the plaintiff of the defective condition of the said boxes and thereupon the plaintiff herein agreed to accept the return of the said boxes and to remove the same; *** that these boxes are still in its possession subject to the orders of the plaintiff herein for their disposition and removal. Wherefore, this defendant denies the defendant herein is indebted to the plaintiff in the sum of Three Thousand Dollars or any other sum whatsoever."

At the conclusion of the plaintiff's evidence the defendant moved the court for a finding in its favor, which motion was overruled.

[illegible]

The defendant thereupon elected to stand on its motion, and the court then directed the jury to find a verdict for the plaintiff.

The defendant states that the grounds it relies upon for a reversal of the judgment are as follows: "First: That the National Box Company, Appellee, plaintiff below, failed to establish a prima facie case. Second: That the verification of the plaintiff's statement of claim is insufficient and that there is therefore no basis upon which the judgment against the Big Ben Beverage Corporation could be entered." In support of the first contention the defendant insists that "under the pleadings in this cause to make a prima facie case it was necessary that the plaintiff prove: - 1st. A sale. a. An agreement to buy and to sell. b. The price. 2nd. If no agreement for price, the fair, reasonable value of the merchandise delivered. 3rd. The amount due." This contention is without the slightest merit, and it is somewhat surprising that the defendant should see fit to make it. The defendant admits, in its affidavit of merits, that it purchased the goods, wares and merchandise from the plaintiff and that the same were delivered during the period set forth in the plaintiff's statement of claim, and the sole defense interposed is that the defendant was not indebted to the plaintiff because the goods were defective. This is an affirmative defense. It is a fundamental rule of pleading that a plaintiff is not required to prove what has been admitted by the defendant in its pleadings. Moreover, under rule 15 of the Municipal court "every allegation of fact in any statement of claim *** except allegations of unliquidated damages, if not denied specifically or by necessary implication, in the pleading of the opposite party, shall be taken to be admitted ***." The defendant has seen fit to cite the case of Mann v. Brown, 263 Ill. 394, as authority for its argument that as the rules of the Municipal court are not preserved in the bill of exceptions this court cannot take cognizance of the

The defendant then moved to amend its motion, and the court then directed the jury to find a verdict for the plaintiff. The defendant asked that the grounds be taken upon for a reversal of the judgment are as follows: "First: That the National Box Company, Appellee, Plaintiff below, failed to establish a prima facie case. Second: That the verification of the plaintiff's statement of claim is insufficient and that there is no evidence on which the judgment against the National Box Company can be entered." In support of the first contention the defendant insists that "under the pleadings it was necessary to make a prima facie case it was necessary that the plaintiff prove: - 1st. A sale. 2nd. An agreement to buy and to sell. 3rd. The value of the merchandise delivered. And, The amount due." This contention is without the slightest merit, and it is somewhat surprising that the defendant should see fit to make it. The defendant admits, in the affidavit of denial, that it purchased the goods, wires and merchandise from the plaintiff and that the same were delivered during the period set forth in the plaintiff's statement of claim, and the only question presented is that the defendant was not indebted to the plaintiff because the goods were defective. This is an affirmative defense. It is a fundamental rule of pleading that a plaintiff is not required to prove what has been established by the defendant in its pleadings. Answer, under rule 18 of the Municipal Court "every allegation of fact in any statement of claim except allegations of unqualified damages, if not denied specifically or by necessary implication, in the pleading of the opposite party, shall be taken to be admitted ***." The defendant has seen fit to cite the case of Smith v. Smith, 203 Ill. 365, as authority for its position, and as the rules of the Municipal Court are not preserved

case. By sec. 2, par. 58, ch. 51, Cahill's Ill. Rev. St., this court must take judicial notice of the rules of the Municipal court.

In support of its second contention the defendant argues that the words "as stated" in the affidavit of claim "cannot be construed as referring to that which is set forth in the plaintiff's statement of claim." There is not the slightest merit in this contention. The affidavit to plaintiff's statement of claim is on the printed form prescribed by the Municipal court and the statement of claim and the affidavit are contained upon one page. The nature of plaintiff's claim is set out clearly in the statement of claim, and the words "as stated" clearly referred to the claim stated in the statement of claim. In Griswold v. H. Paulman & Co., 210 Ill. App. 45, a Municipal court case, it was held that ^{an affidavit containing} the words "as above stated" was a sufficient verification to comply with rule 13 of the Municipal court. In the instant case the defendant did not see fit to question the sufficiency of the affidavit in the lower court and the present contention is an afterthought and without merit.

The bill of exceptions shows that the plaintiff made out a prima facie case by reason of the admissions made by the defendant in its affidavit of merits and by proof as to the amount remaining unpaid. The defendant saw fit to introduce no proof and it may be assumed that its claim that the goods were defective was without foundation in fact. This appeal is without the slightest merit.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Kerner, P. J., and Gridley, J., concur.

most have political motives at the basis of the financial panic.

The bill of exceptions shows that the plaintiff made out a
the present contention is an afterthought and without merit.
in question the defendant's affidavit is the only one made
municipal court. In the instant case the defendant did not see fit
"plead" was a sufficient verification as compared with what is at the
No. 12, a municipal court case, it was held that the words "as shown
the statement of claim. In Wheeler v. A. Graham, 100 Cal. 111.
and the words "as stated" clearly referred to the claim stated in
of plaintiff's claim is set out clearly in the statement of claim,
of claim and the affidavit are contained upon one page. The nature
the printed form prescribed by the Municipal Court and the defendant's
action. The affidavit to plaintiff's statement of claim is on
statement of claim. There is not one significant word in this con-
tained an referring to that which is set forth in the plaintiff's
that the words "as stated" in the affidavit of claim "cannot be con-
in support of its second contention. Its defendant argues

TRANSIT 6, 15.45.00, 15.45.00, 15.45.00

35860

H. T. HUNTER,
Defendant in Error,

v.

G. H. BUCHANAN & COMPANY, INC.,
a corporation,
Plaintiff in Error.

77A
ERROR TO SUPERIOR

COURT, COOK COUNTY.

267 I.A. 614²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff sued the defendant in assumpsit. The declaration consisted of five counts. The first count alleges an oral contract between the plaintiff and defendant whereby, in return for plaintiff's services and \$5,000 par value of certain bonds, the defendant agreed to pay the plaintiff \$583.33 per month and also fifty per cent of the profits that might be paid from the operation of the Chicago office of the corporation to be organized, and of which corporation the plaintiff was to own some of the common, and \$5,000 par value of the preferred stock, such employment to begin on or about January 1, 1931; that the plaintiff entered upon the rendition of his services to the defendant and thereafter delivered the said bonds to the defendant, and otherwise kept and performed all of his promises and agreements, but that the defendant failed and refused, on August 18, 1931, to be further bound by the agreement and discharged the plaintiff, at which time there was due the plaintiff from the defendant \$333.33 as the balance of compensation for the month of July, 1931, and \$583.33 for August, 1931; that the defendant, though often requested, failed and refused to cause said corporation to be formed, likewise failed and refused to return

1000

M. T. HUNTER,
Defendant in Error.

T.

D. E. DUCKMAN & COMPANY, INC.,
Plaintiff in Error.

IN THE COURT OF COMMON PLEAS,
COUNTY OF COLUMBIA, PENNSYLVANIA.

NO. 10,000. RETURNED TO THE COURT BY THE CLERK.

The plaintiff used the defendant in error.

Defendant in error of the plaintiff. The plaintiff used the defendant in error.

An oral contract between the plaintiff and defendant in error.

In return for plaintiff's services and \$2,000 per value of certain

goods, the defendant agreed to pay the plaintiff \$250.00 per month

and also fifty per cent of the profits from the sale of the

operation of the Chicago office of the corporation to be organized.

and of which corporation the plaintiff was an owner of the common

and \$2,000 per value of the property of the defendant in error.

on or about January 1, 1921; that the plaintiff entered upon the

operation of his services to the defendant and thereafter delivered

the said goods to the defendant, and otherwise kept and performed

all of his business and obligations, but that the defendant failed

and refused, on August 12, 1921, to be further bound by the agreement

and discharged the plaintiff, at which time there was due the plaintiff

from the defendant \$250.00 as the balance of compensation for

the month of July, 1921, and \$250.00 for August, 1921; that the

defendant, throughout requested, failed and refused to cause

said corporation to be formed, organized, and returned to plaintiff

the above mentioned bonds, or their value, to the plaintiff, and also failed and refused to pay the plaintiff the sum due him for his services. All the other counts consist of the common counts. The plaintiff filed, with his declaration, an affidavit of claim and also "a copy of the account sued on." The defendant filed a general demurrer to the declaration, which was, of course, overruled. It then filed a "Notice of Plea of Setoff" and a verified "Answer," and thereafter "the defendant's paper filed on the 26th day of October, A. D. 1931, called an 'Answer,'" was stricken. Thereupon the defendant filed a plea of the general issue with an affidavit of merits, and the affidavit was stricken upon motion of the plaintiff. Thereupon, on December 22, 1931, the defendant filed an amended affidavit of merits, which was, upon the oral motion of the plaintiff, stricken on December 24, 1931. The plea of the defendant was then stricken for want of a sufficient affidavit of merits and the default of the defendant entered for want of a plea, and thereupon the court found, from the plaintiff's affidavit of claim, that there was due and owing to the plaintiff from the defendant the sum of \$4,986.60, and judgment was entered for that amount. Four days later, within the term, the defendant filed a written motion to vacate the judgment and for leave to file instantaner an amended affidavit of merits, and also filed affidavits in support of the motion, and the defendant offered to abide by any terms which the court might fix in the premises. This motion was heard on December 29, 1931, at which time it was denied. This writ of error followed.

The defendant contends and strenuously argues that "the declaration was not sufficient to support the judgment." While there is force in this contention, and the plaintiff has not seen fit to meet it squarely, nevertheless, we do not deem it necessary to decide it.

the above mentioned bonds, or their value, to the plaintiff, and
also failed and refused to pay the plaintiff the sum due him for
his services. All the other counts contained in the common counts.
The plaintiff filed with his declaration, an affidavit of claim
and also "a copy of the account sued on." The defendant filed a
general answer to the declaration, which was of course, overruled.
It then filed a "Notice of Trial or Verdict" and a verified "affidavit."
and thereafter "the defendant's" paper filed on the 28th day of October
A. D. 1931, called an "answer," was returned. Thereupon the defendant
and filed a plea of the general issue with an affidavit of denial,
and the affidavit was taken upon motion of the plaintiff. There-
upon, on November 11, 1931, the defendant filed an amended affidavit
of denial, which was, upon the oral motion of the plaintiff, returned
on November 24, 1931. The plea of the defendant was then stricken
for want of a sufficient affidavit of denial and the denial of the
defendant returned for want of a plea, and thereupon the court found,
that the plaintiff's affidavit of claim, filed there was due and owing
to the plaintiff from the defendant the sum of \$4,000.00, and judgment
was entered for that amount. The jury found, under the facts,
the defendant filed a written motion to vacate the judgment and for
leave to file another an amended affidavit of denial, and also
filed affidavits in support of the motion, and the defendant offered
to abide by any terms which the court might fix in the premises.
This motion was heard on December 22, 1931, at which time it was
denied. This trial is now followed.
The defendant's answers and affidavits against the
declaration was not sufficient to support the judgment. While
there is error in this controversy, and the plaintiff has not been

The defendant contends that "the plaintiff's affidavit of claim should not have been used as prima facie proof of the plaintiff's demands." We do not deem it necessary to consider this contention, but we may state that the plaintiff concedes that the amount of the judgment was larger than was warranted under the affidavit of claim and he offers to remit a certain part of the judgment.

The defendant contends that "the amended affidavit of merits of December 22, 1931, stated a good defense, setting forth the nature thereof and, therefore, it should not have been stricken." This amended affidavit of merits was stricken upon the oral motion of the plaintiff and the defendant is justified in contending that the trial court should not have entertained an oral motion to strike the affidavit. The rules of the Superior court require that all motions not of course shall be made in writing (see Rule 22), and a motion to strike an affidavit of merits from the files is not a motion of course. (See Gettschalk v. Village of Posen, 252 Ill. App. 352, 355.) The major argument of the plaintiff in support of the action of the trial court in striking the amended affidavit of merits is, "that the affidavit should be as to existing facts so that if false the party making it could be convicted of perjury. The affidavit of merits of December 22, 1931, in no wise meets these requirements." We have carefully considered the argument of the plaintiff in support of this contention and we are of the opinion it amounts to ^{no} more than this, that the affidavit does not set forth the facts constituting the defense in a direct and positive manner, because of the form in which the facts are stated. It is a sufficient answer to this contention to say that a motion to strike does not reach matters of form. (See White v. Central Trust Co., 259 Ill. App. 68, 72.) While, as the defendant frankly admits, the amended affidavit of merits was

inartificially drafted, nevertheless, it denies the parcel contract alleged by the plaintiff and avers that there was an entirely different contract between the parties and specifies the provisions of the same and alleges full performance on its part, and certain defaults, breaches and nonperformance of its provisions by the plaintiff. In the oral argument the main point urged by counsel for the plaintiff was, that because of the form in which the facts were alleged, the affiant could not be prosecuted for perjury. We cannot agree with this contention.

The defendant contends that "the Court should have granted the defendant's motion of December 31, 1931, to vacate the judgment and give it leave to file its amended affidavit of merits instantner." It appears that after judgment was entered against the defendant it recognized, apparently, that it had suffered through the incompetency of its counsel, and it immediately retained other counsel, who promptly made the motion of December 31, 1931. By this motion, made two days after judgment was entered, and in term time, the defendant moved the court to vacate the judgment and to permit it to file instantner an amended affidavit of merits, and the defendant offered "to abide by any terms which the court may fix in the premises." That the amended affidavit of merits, which the defendant presented to the court in connection with the motion, stated a good defense to plaintiff's claim, upon the merits, is not disputed. The sole contention urged by the plaintiff in support of his argument that the trial court did not abuse its discretion in denying the motion of December 31, 1931, is that it was obvious to the court that the motion was not made in good faith and that the sole purpose of it "was to obtain more time before a levy would be made." We are unable to find anything in the record that justifies this argument. If the

...the fact that the plaintiff's evidence is not only inconsistent with the defendant's evidence, but also with the facts as shown by the evidence in the case. The plaintiff's evidence is not only inconsistent with the defendant's evidence, but also with the facts as shown by the evidence in the case. The plaintiff's evidence is not only inconsistent with the defendant's evidence, but also with the facts as shown by the evidence in the case.

The defendant's evidence is not only inconsistent with the plaintiff's evidence, but also with the facts as shown by the evidence in the case. The defendant's evidence is not only inconsistent with the plaintiff's evidence, but also with the facts as shown by the evidence in the case. The defendant's evidence is not only inconsistent with the plaintiff's evidence, but also with the facts as shown by the evidence in the case.

The court has found that the plaintiff's evidence is not only inconsistent with the defendant's evidence, but also with the facts as shown by the evidence in the case. The court has found that the plaintiff's evidence is not only inconsistent with the defendant's evidence, but also with the facts as shown by the evidence in the case. The court has found that the plaintiff's evidence is not only inconsistent with the defendant's evidence, but also with the facts as shown by the evidence in the case.

original counsel for the defendant had been merely seeking delay he could have accomplished that object by filing a demand for a jury trial. This he did not do. Nor is an ordinarily able counsel, who seeks to obtain delay, compelled to exhibit utter lack of skill in pleading. Counsel for the defendant would have been justified in filing a general demurrer to the first count of the declaration, but he filed a general demurrer to the entire declaration, which contained also the common counts, and when that demurrer was overruled and the defendant ruled to plead the counsel then filed an "answer" to the declaration, and one would suppose from reading the same that it was filed in a chancery proceeding. The patience of the trial court may have been tried, as counsel for the plaintiff argue, by the actions of the counsel for the defendant, and, if the counsel for the plaintiff made the same unfair argument to the trial judge as to the alleged bad faith of the defendant that they have made in this court, that fact may have influenced the trial judge in denying the motion to vacate the judgment. "As we understand the long and well settled practice in this State, it has always been liberal in setting aside defaults at the term at which they were entered, where it appears that justice will be promoted thereby. * * * It has also been the practice to impose reasonable terms upon the defendant as a condition to allowing his motion, such as that he plead to the merits, that he pay the costs or that he comply with such other reasonable terms as may be imposed. In such cases the object is that justice be done between the parties, and not to permit one party to obtain and retain an unjust advantage." (Mason v. McManara et al., 57 Ill. 274, 277; McMurray v. Peabody Coal Co., 281 Ill. 218, 223.) In the instant case counsel for the defendant offered to submit to the imposition of any terms the trial court might see fit to impose

original document for the evidence and have been...
the court have...
jury trial. This is the case. Now in an ordinary civil case,
the court is asked to decide, and the court is asked to decide
in the case. Counsel for the defendant would have been...
is filing a general answer to the first count of the...
but he filed a general answer to the entire...
against also the common counts, and when that answer was...
and the defendant tried to show that the answer was...
to the decision, and the court would have been...
it was filed in a summary proceeding. The...
court may have been asked, as counsel for the...
the nature of the answer for the defendant, and...
for the plaintiff made the same...
as to the alleged fact of the defendant that they have made in
this court, that they may have...
the motion to reverse the judgment. "As no...
well settled practice in this State, it has always been...
setting aside a judgment as the case at which they were entered, when
it appears that justice will be promoted thereby." "It is the...
been the practice to require...
a condition to allowing his motion, such as that he...
motion, that he pay the costs or that he comply with...
reasonable terms as may be imposed. In such...
motion to have...
costs and retain an...
of the...
in the instant case counsel for the defendant...
the imposition of any terms the trial court might see fit to impose

upon it. However provoked the trial judge may have been by the conduct of the original counsel for the plaintiff in the matter of pleadings, his action in denying the motion of December 31, 1931, does not accord with our ideas of evenhanded justice.

The judgment order of December 31, 1931, is reversed and the cause is remanded with directions to the trial court to vacate the judgment order of December 24, 1931, and to allow the defendant leave to file its plea and its amended affidavit of merits and to have a trial of the cause upon the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

Kerner, P. J., and Gridley, J., concur.

With a view to the above, the following is suggested:

1. The Commission should be authorized to conduct a study of the economic situation of the people of the Republic of the Philippines, with particular reference to the rural areas, and to submit a report thereon to the President.

2. The Commission should be authorized to conduct a study of the economic situation of the people of the Republic of the Philippines, with particular reference to the rural areas, and to submit a report thereon to the President.

3. The Commission should be authorized to conduct a study of the economic situation of the people of the Republic of the Philippines, with particular reference to the rural areas, and to submit a report thereon to the President.

4. The Commission should be authorized to conduct a study of the economic situation of the people of the Republic of the Philippines, with particular reference to the rural areas, and to submit a report thereon to the President.

5. The Commission should be authorized to conduct a study of the economic situation of the people of the Republic of the Philippines, with particular reference to the rural areas, and to submit a report thereon to the President.

6. The Commission should be authorized to conduct a study of the economic situation of the people of the Republic of the Philippines, with particular reference to the rural areas, and to submit a report thereon to the President.

7. The Commission should be authorized to conduct a study of the economic situation of the people of the Republic of the Philippines, with particular reference to the rural areas, and to submit a report thereon to the President.

8. The Commission should be authorized to conduct a study of the economic situation of the people of the Republic of the Philippines, with particular reference to the rural areas, and to submit a report thereon to the President.

9. The Commission should be authorized to conduct a study of the economic situation of the people of the Republic of the Philippines, with particular reference to the rural areas, and to submit a report thereon to the President.

10. The Commission should be authorized to conduct a study of the economic situation of the people of the Republic of the Philippines, with particular reference to the rural areas, and to submit a report thereon to the President.

35933

DONATO QUINTILIANO,
Defendant in Error,

v.

NAN BUCHNER,
Plaintiff in Error.

78 7
ERROR TO CIRCUIT COURT,

COOK COUNTY.

267 I.A. 614³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review an order entered February 26, 1932, denying the verified petition of the defendant to vacate a judgment for \$2,707.50 entered against the defendant by confession on a judgment note for \$3,000, on November 18, 1931, and to grant leave to the defendant to appear and defend against the suit of the plaintiff, "or that at least the judgment may be opened and your petitioner be allowed to present her defense to the claim of the plaintiff herein." The plaintiff has not seen fit to defend the record in this court.

The petition was filed December 3, 1931, within the term at which the judgment was rendered. The verified petition sets up, inter alia:

That petitioner "is the defendant in the above entitled cause, that judgment was entered by confession in this Court on November 18, 1931 for \$2,707.50 upon a pretended judgment note of this defendant which was procured under the following circumstances, to-wit:

"One George Jank, who had borrowed money from the husband of your petitioner prior to her widowhood, and had thereby gained the confidence of this defendant, on or about the month of May, 1929, requested this defendant to loan to him, the said George Jank, \$1,000.00 and advised this defendant that he was conveying to this defendant as security for the said loan, real estate described as follows, to-wit:

(Here follows a description of the real estate.)

"That thereafter and on or about November 30, 1929, the said George Jank informed this defendant that to repay the said \$1,000.00 which he had borrowed from this defendant that he, the said George Jank, had arranged with Donato Quintiliano,

● ● ●

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THE UNIVERSITY OF CHICAGO PRESS

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[illegible]

Investigation and Intelligence Division, FBI, 22 West Jackson St., is advised.

By agreement with a judgment made on November 18, 1951

and in great love to the Government in general and to the people.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 01-11-2001 BY 60322 UCBAW

Approved and Sent with Minutes for Signature of Secretary

"The Journal of the American Medical Association"

U.S. DEPARTMENT OF AGRICULTURE

1961-62

and the other two are not. The first is the one that is not.

1911-1912

This material was received under the following circumstances:

[illegible]

(...)

*This investigation was completed about November 20, 1954.

who is the plaintiff in this case, to secure the money, but that it would be necessary for this defendant to sign some papers and particularly stated that this defendant would, at the time the said \$1,000.00 was repaid to this defendant, be required to sign a deed conveying the real estate hereinbefore described and that the said George Jank arranged an appointment with plaintiff herein and accompanied this defendant to the office of an attorney at that time representing the plaintiff herein, and on or about the said November 30, 1929, this defendant for the first time met the plaintiff herein at the office of his said attorney; thereupon the said George Jank then and there introduced this defendant to the plaintiff herein, the said Jank stating in the presence of the plaintiff herein and this defendant that the said Donato Quintiliano was going to loan him, the said Jank some money to repay this defendant the \$1,000.00 which he, the said Jank then owed this defendant, and that said Donato Quintiliano, the plaintiff herein, was also to loan some additional money which was to be applied by the said Jank in payment of part of the mortgage indebtedness then against the real estate hereinbefore described; thereupon the said Jank in the presence of the said Donato Quintiliano and his attorney and also in the presence of this defendant stated to this defendant that as the above described real estate was then standing in the name of this defendant that this defendant would have to sign some papers but that the signing of the said papers was only a matter of form; that then and there this defendant in the presence and hearing of the plaintiff and his said attorney stated that she did not want to sign any papers aside from a supposed deed which she had already signed and delivered to the said Jank and this defendant then and there asked what all these other papers were for; whereupon the said Jank did then and there in the presence of the said Donato Quintiliano, the plaintiff herein, and his said attorney state to this defendant that the signing of the papers then presented to this defendant for signature was only a matter of form, necessary because the title to the real estate hereinbefore described stood in the name of this defendant and before the said Donato Quintiliano plaintiff herein, would pay over any money, this defendant would have to sign the said papers; that thereupon, this defendant, in the presence of the plaintiff and his said attorney, asked the said attorney what he thought about this defendant signing said papers; thereupon and in the presence of the plaintiff herein and this defendant, said attorney, to-wit: Daniel A. Covelli, said to this defendant, well, you know I am Mr. Quintiliano's lawyer so I can't say anything; that thereupon the said Donato Quintiliano, plaintiff herein, said to this defendant, why, you do not need to be afraid; that thereafter this defendant said to the said Donato Quintiliano, plaintiff herein, you understand this property does not belong to me at all, therefore I want to be sure that my own property is in no danger, I only have the deed to this Wentworth Avenue property which I hold as security for my \$1,000.00, I haven't a penny in it and I don't want this property at all, it is not mine and I don't want it, I only want my \$1,000.00, I am a widow with two small children and have kept my home free from debt, it is sacred to me and I don't want it involved; that thereupon the said Donato Quintiliano, plaintiff herein, said to this defendant that he understood that the Wentworth Avenue property did not belong to this defendant, that a Mr. Newell had told him all about it and he knew that this defendant had no interest in the said Wentworth Avenue property other than the \$1,000.00 which this defendant had loaned to the said Jank; that the said attorney for plaintiff, to-wit: Daniel A. Covelli, in the presence and hearing of the plaintiff said, "this lady" (meaning your petitioner) "don't want to sign these papers;"

[illegible]

that thereafter this defendant said to the said Donato Quintiliano, plaintiff herein, suppose something should happen to that property before the six months are up, would my own property be in danger; that thereupon said Donato Quintiliano, plaintiff herein, said to this defendant, no! no! you have nothing to worry about, your own property is perfectly safe so far as I am concerned; whereupon this defendant, believing and relying upon the statements and representations of the said Donato Quintiliano, plaintiff herein, then and there made to this defendant and believing the same to be true, did then and there in the presence of the plaintiff herein and his attorney, while at the same time this defendant was not represented by counsel nor advised by any persons other than by plaintiff, his attorney, and such counsel as the said Jank then and there gave in the presence and hearing of said plaintiff, and believing at the time that she was not creating any liability which could be enforced against her in any manner and that the signature of this defendant to the note here sued upon would be held by the plaintiff herein solely as a charge against the premises hereinbefore legally described and not as a personal liability of this defendant, did then and there sign all of the papers placed before her by the said Jank, Attorney Daniel A. Covelli, and the plaintiff herein and while so relying on the aforesaid promise of the plaintiff herein that she had not created any liability that could or would, so far as the plaintiff herein was concerned, affect or in any way be likely to deprive this defendant of her own property, this defendant was by the said attorney for plaintiff herein and the said Jank, taken to a bank and given a check for the sum of \$1,000.00 and no more, which said check was then and there represented to this defendant to be the repayment of the aforesaid loan of \$1,000.00 made to the said Jank and that said payment of \$1,000.00 to this defendant and the delivery of the said deed conveying the aforesaid real estate, to the said Jank closed the entire transaction so far as this defendant was concerned and that the plaintiff herein looked solely to the said described real estate for repayment of his money loaned as aforesaid. The acts and doings of plaintiff herein constituted a fraud upon this defendant, whereby the plaintiff herein is estopped from claiming any sum of money whatsoever from this defendant.

"Your petitioner further represents that the plaintiff herein, by this present attorney, C. W. Harris, did, on the 25th day of July, 1930, confess a judgment for \$3,366.61 in this Court in case No. B-203744 upon the identical note upon which judgment was confessed herein, whereby the warrant of attorney on the said note, if the said note should be found by this Court to have been obtained without fraud, from your petitioner, was exhausted, and the entry of the judgment herein, while the said suit was pending and before the determination of the said suit, in which case the plaintiff herein, on his own motion moved to vacate said judgment entered on July 25, 1930 and to dismiss the suit, and in which suit final judgment was entered on Wednesday, November 23, 1931, wherefore your petitioner alleges that the action herein was commenced while the aforesaid action was still pending in this Court, and that this action is thereby prematurely brought and the judgment herein should be vacated and this cause dismissed; * * * that the plaintiff herein at no time paid over the sum of \$3,000.00 to this defendant as shown by the face of the note upon which the judgment herein was confessed, and that the plaintiff in fact, paid to the said George Jank the sum of \$2,470.00 on or about November 30, 1929, and that the plaintiff has always demanded of your petitioner since the 25th day of July, 1930, the sum of \$3,366.61, together with an additional sum as costs and interest on the said sum, and that he has, at no time, requested

this defendant to pay the said sum of \$2,470.00, which is the most that could be demanded of this defendant if she is held responsible for the note herein sued upon, and that therefore the plaintiff herein can not maintain his action for the interest and costs on the said sum of \$2,470.00 in the event this Court finds all other defenses offered herein to be insufficient to relieve your petitioner of the payment of any part of the sum claimed by the plaintiff herein."

The defendant contends that "after a judgment by confession has been vacated on motion, it is error to thereafter allow plaintiff * * * to file a new suit in the same court and confess judgment on the identical note originally sued upon, while the original suit is still pending." In support of this contention the defendant cites Western Cold Storage Co. v. Keeshin, 252 Ill. App. 165, 167, but that case does not apply to the instant one. In the case cited the plaintiff confessed judgment against the defendant, and later, upon defendant's motion, the judgment was set aside and vacated and leave was given to plaintiff to file an amended statement of claim and cognovit within five days. The plaintiff filed an amended statement of claim and a few days later a judgment by confession was again entered against the defendant, and later a verified motion of the defendant to vacate the judgment was denied by the trial court. In the opinion filed by the first division of this court it was said: "It is quite evident that, when the court by its order of May 24 sustained defendant Keeshin's motion to vacate the judgment and to permit him to make a defense to the suit, and plaintiff was given leave to file an amended statement of claim, the cause then stood as the ordinary case which is proceeding to a trial. Under the proper practice, after plaintiff filed his amended statement of claim, defendant should have been ruled to plead or answer to the same within a day certain, or an order should have been entered that his petition to vacate the judgment should stand as his answer to the amended statement of claim and the cause should then have been set down for trial. After a judgment by confession has been

vacated and a defendant permitted to defend in the action, it is obviously irregular to proceed against him under the power to confess judgment. The second judgment against him was improperly entered and the motion to vacate the same should have been allowed." In Vandershall v. Goldsmith, 231 Ill. App. 165, it was held that the entering of a judgment by confession under warrant of attorney in promissory notes, which was subsequently vacated on motion by the plaintiff, did not exhaust the power or affect the validity of a subsequent judgment by confession entered under the warrant of attorney, since none but a valid judgment exhausts the power. Certiorari was denied by the Supreme court in that case, which seems to dispose of the instant contention of the defendant. We do not wish to be understood as approving the practice followed by the plaintiff in this case and we think that the trial court, in passing upon the instant petition, should have taken into consideration the evident intent of the plaintiff to prevent the defendant from presenting her defense to the claim.

The defendant contends that under the facts set up in the petition it appears that the promissory note in question was made and executed without consideration, and received by the plaintiff upon an express agreement that the maker should never be called upon to pay it, and it is therefore invalid in the hands of the plaintiff and cannot be enforced by the plaintiff against the defendant. In support of this contention the defendant cites the case of Strauss v. Citizens' State Bank, 254 Ill. 135, wherein the court stated: "The facts as found by the Appellate Court, in so far as they apply to the \$3500 note relied upon in the plea of setoff, are, that said note was executed without any consideration and was received by appellant upon an agreement that appellee should never be called upon to pay the same. We are bound by the facts as recited in the

final judgment of the Appellate Court. The only question that is open for consideration in this court is whether the law was properly applied to the facts as found by the Appellate Court. If the note relied on as a set-off was made, executed and delivered to the bank without any consideration and upon the agreement that appellee should never be required to pay said note, it is difficult to see how a recovery could be sustained by the bank. If there was no consideration for the note the bank cannot be a holder in due course for value. There are some propositions that are so well settled and clear that any attempt at argument in support of them is a useless expenditure of time. That a promissory note made and executed without consideration and received by the payee upon an agreement that the maker should never be called upon to pay the same is invalid in the hands of such payee and cannot be enforced against the maker is a proposition of that character." (See also Schmidt v. Schmidt, 253 Ill. App. 514; First Nat'l Bank of Harvey v. Trott, 236 Ill. App. 412.) We are satisfied that the instant contention of the defendant is a meritorious one and that the trial court erred in denying the prayer of the petition.

The defendant has assigned and argued a number of other alleged errors, but in the view that we have taken of this writ of error it is entirely unnecessary for us to consider them.

The judgment order of February 26, 1932, of the Circuit court of Cook county, is reversed, and the cause is remanded with directions to the trial court to allow the defendant to appear and defend against the suit of the plaintiff, the judgment to stand as security.

REVERSED AND REMANDED WITH DIRECTIONS.

Kerner, P. J., and Gridley, J., concur.

final judgment of the appellate court. The only question that
is open for reconsideration in this court is whether the law was
properly applied to the facts as found by the appellate court. It
the case relied on as a precedent was made, discussed and applied to
the facts without any consideration and upon the argument that the
court should never be required to pay such costs as is entitled to the law
a recovery could be obtained by the bank. If there was no recovery
allow for the note the bank cannot be a plaintiff in the cause for value.
There are some precedents that are well settled and clear that
any attempt at argument in support of them is a waste of time and
at times a harassment. This case was argued without precedent
and received by the court upon an agreement that the bank should
never be called upon to pay the costs as it is entitled to the bank of such
costs and cannot be entered against the bank as a proposition of
fact character." (See also Bank of America v. Bank of New York, 100 N.Y. 211)
Bank of New York v. Bank of America, 100 N.Y. 211, 100 N.Y. 211
established that the bank's contention of the defendant is a violation
and that the trial court acted in denying the prayer of the
defendant.
The defendant has assigned and argued a number of other
alleged errors, but in the view that we have taken of this case of
error is so manifestly manifest that we do not discuss them.
The judgment of the court of February 22, 1902, of the circuit
court of New York, is affirmed, and the case is remanded with
instructions to the trial court to allow the defendant to appear and
argue against the entry of the judgment. The judgment is affirmed.

REVEREND THE HONORABLE THE JUSTICE

36146

JULIA BOROWINSKI,
Appellee.

vs.

JOHN HARRYL et al.,
Defendants.

On Appeal of JAMES H. HOOPER,
Appellant.

79 7
INTERLOCUTORY APPEAL FROM
SUPERIOR COURT OF COOK COUNTY.

267 I.A. 614⁴

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by James H. Hooper, one of the defendants in a foreclosure proceeding, from an order appointing a receiver.

It is first objected that the bill is not properly verified, in that the affidavit is not sworn to by the complainant but by an agent who does not swear that he knows the value of the property. We know of no rule requiring the verification of such a bill to be made by the complainant. The verification was sufficient.

The bill seeks to foreclose a trust deed given to secure a principal indebtedness of \$1800; it alleges that at the time of the filing of the bill the principal and past due interest exceeded \$2800; that the premises are improved with a one story frame bungalow of a fair cash market value not to exceed \$2000. It alleges that title to the premises was vested in Marie Harryl. She appeared in court upon the motion to appoint a receiver and represented that she was the owner of the premises; that it was insufficient security, and consented that a receiver be appointed. Opposed to this, Hooper presented an affidavit to the effect that the value of the premises is now \$7500. The court, after considering the bill of complaint and the statement of Marie Harryl and the affidavit of Hooper, was of the opinion that the premises were scant security for the amount due under the note and trust deed.

that judgment of the appellate court. The only question that
is open for consideration in this court is whether the law was
properly applied in the facts as found by the appellate court. It
the note relied on as a valid promissory note, and whether in
the bank without any consideration and upon the agreement that deposits
should never be required to pay said note, it is difficult to see how
a recovery could be maintained by the bank. It there was no considera-
tion for the note the bank cannot be a holder in due course for value.
There are some propositions that are as well settled as that that
any attempt at recovery in support of them is a hopeless endeavor
at this time. That a promissory note made and executed without considera-
tion and received by the payee upon an agreement that the maker should
never be called upon to pay the same is invalid in the hands of such
payee and cannot be enforced against the maker is a proposition of
that character." (See also Wells v. Wells, 111 Cal. 424, 430, 431.)
It is not the duty of the court to inquire into the validity of the
agreement made by the parties in support of the note at the
time and place the note was made and received by the payee at the

Petition.

The petition was amended and signed a second time by the
alleged owner, but in the view that to have taken at this time of
error it is entirely unnecessary and so is omitted here.
The judgment of the court is affirmed, and the case is remanded with
costs of this court to be paid by the appellant, and the court is requested that
it be so ordered. It is also requested that the petition be amended and
that the court be so advised. The judgment is affirmed.

36146

JULIA BOROWINSKI,
Appellee,

vs.

JOHN HABRYL et al.,
Defendants.

On Appeal of JAMES H. HOOPER,
Appellant.

79 7
INTERLOCUTORY APPEAL FROM
SUPERIOR COURT OF COOK COUNTY.

267 I.A. 614⁴

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by James H. Hooper, one of the defendants in a foreclosure proceeding, from an order appointing a receiver.

It is first objected that the bill is not properly verified, in that the affidavit is not sworn to by the complainant but by an agent who does not swear that he knows the value of the property. We know of no rule requiring the verification of such a bill to be made by the complainant. The verification was sufficient.

The bill seeks to foreclose a trust deed given to secure a principal indebtedness of \$1800; it alleges that at the time of the filing of the bill the principal and past due interest exceeded \$2800; that the premises are improved with a one story frame bungalow of a fair cash market value not to exceed \$2000. It alleges that title to the premises was vested in Marie Habryl. She appeared in court upon the motion to appoint a receiver and represented that she was the owner of the premises; that it was insufficient security, and consented that a receiver be appointed. Opposed to this, Hooper presented an affidavit to the effect that the value of the premises is now \$7500. The court, after considering the bill of complaint and the statement of Marie Habryl and the affidavit of Hooper, was of the opinion that the premises were scant security for the amount due under the note and trust deed.

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DATE

BY

ON BEHALF OF THE NATIONAL ARCHIVES

2071A.614

RECEIVED

This is an affidavit sworn by James A. Hopper, one of the debtors in a receivership proceeding, that an order regarding a receiver.

It is first objected that the bill is not properly verified. In fact the affidavit is not sworn to by the complainant but by an agent who does not swear that he knows the value of the property. We know of no case requiring the verification of such a bill to be made by the complainant. The verification was unnecessary.

The bill needs to be verified a third time given to secure a principal indebtedness of \$1000; it alleges that at the time of the filing of the bill the defendant was not an indebted person.

§2202; that the proceeds are deposited with a one dollar fund. Paragraph of a bill cannot be used as evidence. It alleges that this is the first time the bill was verified in this court. The affidavit is sworn upon the bill to appoint a receiver and transmitted that the bill was the subject of the proceeding; that it was transmitted to the court, and requested that a receiver be appointed. Opposed to this, Hopper presented an affidavit at the effect that the value of the property is not \$1000. The court, after reading the bill of complaint and the statement of James Hopper, and the affidavit of Hopper, was of the opinion that the proceeds were

We cannot say that this conclusion was not justified. It is notorious that at the present time the market value of real estate is very much less than it was at the date of the instant trust deed, October, 1919. Furthermore, the record shows that upon the hearing of the motion Hooper did not claim to have any interest in the premises. Neither did he make a motion to discharge the receiver upon the ground that he was interested. He therefore is in no position to question in this court the appointment of the receiver.

Defendant Hooper asserts that the trust deed does not convey the rents as additional security for the payment of the indebtedness. In this he is in error. The trust deed does pledge the rents and the bill of complaint so alleges.

Some ten days after the entry of the order appointing the receiver Hooper filed his answer, in which he asserted that he was the owner of the real estate and that neither John Habryl nor Marie Habryl had any interest therein. It thus appears there is a controversy as to who is the owner of the premises, which is an additional reason why the order appointing a receiver should not be disturbed.

For the reasons indicated the order appealed from is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

We cannot say that this conclusion was not justified. It is not
factors that at the present time the market value of real estate
is very much less than it was at the date of the instant deed.
deed, October, 1911. Furthermore, the record shows that upon the
hearing of the estate Rogers did not claim to have any interest
in the premises. Neither did he make a motion to discharge the
trustee upon the ground that he was not entitled to the proceeds of
in no position to question in this court the management of the
trustee.

Defendant Rogers asserts that the trust deed does not convey
the rents as additional security for the payment of the indebtedness.
In this he is in error. The trust deed does charge the rents and
the bill of exchange as follows:
Some ten days after the entry of the order appointing the
trustee Rogers filed his answer, in which he asserted that he
was the owner of the real estate and that neither John Kirby nor
Marie Kirby had any interest therein. It now appears that in a
controversy as to who is the owner of the premises, which is an
additional reason why the order appointing a trustee should not
be dissolved.

For the reasons stated the court concludes that it
affirms.

REVEREND,

Mathews and O'Connor, JJ., concur.

35698

ANTON MIKELIONIS,
Defendant in Error,
vs.
STANLEY KONECKI,
Plaintiff in Error.

807
ERROR TO SUPERIOR COURT
OF COOK COUNTY.

267 I.A. 614⁵

MR. PRESIDING JUSTICE MASURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for malicious prosecution, upon trial had a verdict for \$7,700. There was a remittitur of \$2,000 and judgment for \$5,700 was entered, which defendant seeks to have reversed.

As a preliminary comment, we suggest that counsel for both parties read Rule 19 of this court, prescribing the form in which briefs should be written.

A brief outline of the facts is as follows: Plaintiff was conducting a baking business with Stanley Stelnis at 12001 Indiana avenue, Chicago; some time prior to March, 1923, he occupied the premises under a lease from a party named Alguinowicz; March 19, 1923, while the lease had some months yet to run, a fire occurred in the premises; two days thereafter the defendant purchased the property. Defendant testified that when he first visited the premises after the fire he saw water, steam and gas pipes hanging to the walls and ceilings, but on a subsequent visit saw these pipes disconnected and lying on the floor. The defendant thereupon accused plaintiff of having disconnected these pipes, which plaintiff denied; defendant then went to one of the branch municipal courts of Chicago and swore out a warrant, charging plaintiff, who was still living on the second floor of the premises, with having injured and defaced the building by tearing out the pipes, which were the property of defendant; plaintiff was arrested on this warrant and taken to the police station, placed in a cell and kept there "a couple of

ARTHUR M. KILPATRICK
Defendant in Error
vs.
STANLEY KORNBERG
Plaintiff in Error

267 I.A. 614

IN SENATE
JANUARY 10, 1934

Plaintiff, bringing suit for malicious prosecution, upon
trial had a verdict for \$2,000. There was a verdict of \$2,000
and judgment for \$2,000 was entered, with interest thereon
from January 1, 1932.

As a preliminary comment, we suggest that counsel for both
parties read Rule 19 of this court, prescribing the form in which
briefs should be written.

A brief outline of the facts is as follows: Plaintiff was
conducting a business with Stanley Kornberg at 18001 Indiana
avenue, Chicago; some time prior to March, 1932, he occupied the
premises under a lease for a long term (approximately 1925-1935).
1932, while the lease had some months yet to run, a fire occurred
in the premises; two days thereafter the defendant purchased the
property. Defendant testified that when he first visited the
premises after the fire he saw water, steam and gas pipes hanging
to the walls and ceiling, but on a subsequent visit saw them
pipes disconnected and lying on the floor. The defendant thereupon
advised plaintiff of the situation and asked plaintiff to remove his
belongings; defendant then went to one of the branch banks and
Chicago and there got a contract, written plaintiff, for the
living on the second floor of the premises, with certain fixtures and
between the building by leaving out the pipes, which were the property
of defendant; plaintiff was arrested on this contract and taken to

hours," when he was released on bond. Upon trial on this charge plaintiff was discharged and the instant suit for malicious prosecution followed.

Defendant complains of the action of the court in its rulings upon the admissibility of testimony. Complaint is made as to the admission of plaintiff's testimony relating to an alleged threat made prior to the fire by defendant, that he would get plaintiff out of the premises. While the particular question asked may have been leading, yet the evidence itself was admissible as touching upon the motive of the defendant in having plaintiff arrested.

We cannot say that it was prejudicial error to permit plaintiff to describe the fire in detail. This would show the condition of the pipes after the fire. Plaintiff admitted that he disconnected one large pipe which was hanging down and threatening to fall, and laid it on the floor.

Plaintiff was permitted to introduce the transcript in a replevin suit brought by him and his associate, Stolnis, against the defendant, with reference to a boiler located on the premises. Property to this was found to be in the plaintiffs. This replevin suit was commenced after the case against plaintiff had been ^{terminated} terminated in the Municipal court. We do not see how evidence as to the replevin suit would throw any light upon the motives of defendant in making the criminal charge against plaintiff. Its admission in evidence might tend to influence the jury to believe that because plaintiff had prevailed in the replevin suit, therefore defendant had no probable cause to institute criminal proceedings against plaintiff. This evidence was improper and should have been excluded.

The transcript of the record of the criminal charge against plaintiff in the Municipal court was admitted in evidence. It is a well settled rule in these cases that the record of the criminal case may be introduced in evidence solely for the purpose of proving

hours," when he was released on bond. Upon trial on this charge
defendant was discharged and the instant suit for malicious prosec-
ution followed.

Defendant complains of the action of the court in its ruling
upon the admissibility of testimony. Complaint is made as to the
admission of plaintiff's testimony relating to an alleged threat
made prior to the time of defendant's arrest and plaintiff's out-
come of the premises. While the particular question asked may have been
leading, yet the evidence itself was admissible as appearing upon the
narrative of the defendant in saying plaintiff's narrative.

We cannot say that it was prejudicial error to permit plain-
tiff to describe the knife in detail. This would show the connection
of the knife after the first. Plaintiff admitted that he disconnected
one large pipe which was hanging down and threatening to fall, and
laid it on the floor.

Plaintiff was permitted to introduce the transcript in a re-
gular suit brought by him and his associates, Etchells, against the
defendant, with reference to a boiler located on the premises. Prop-
erty to this was found to be in the defendant's. This regular suit
was commenced after the case against plaintiff had been commenced in
the Municipal court. We do not see how evidence as to the regular
suit would show any light upon the matter of defendant's narrative
the criminal charge against plaintiff. Its admission in evidence
might tend to influence the jury to believe that because plaintiff
had prevailed in the regular suit, therefore defendant had no
probable cause to institute criminal proceedings against plaintiff.
This evidence was improper and should have been excluded.

The transcript of the record of the criminal court against
plaintiff in the Municipal court was admitted in evidence. It is
a well settled rule in these cases that the record of the criminal

that it had terminated, and the jury should be informed that this was the sole purpose of its admission. Anderson v. Fletcher, 228 Ill. App. 372. In the present case the court not only failed to limit the purpose for which the criminal case record was introduced, but by certain remarks and rulings virtually told the jury that the disposition of the criminal case was an adjudication that the defendant did not have probable cause to believe plaintiff guilty and to have him arrested. This was prejudicial error.

Plaintiff was permitted to state that he sold out his interest in the bakery business to his partner, Stolnis, some six months after the arrest because he "could make no business," thus leading the jury to infer that his business had suffered because of his arrest and that in consequence of this he had been forced to sell out:

Plaintiff sought to introduce evidence as to his reputation. Such evidence is admissible. Burch v. Lockwood, 247 Ill. App. 66. But the method followed was highly improper. For instance, the character witness was asked: "Q. What did people generally think of him in the neighborhood?" The answer was, "Absolutely good." Another witness was asked: "Q. Do you know his reputation?" (Objection) "A. Yes." "Q. Was his reputation good or bad at that time?" A. Good." The question as to reputation should have indicated in what respect his reputation was good or bad, that is, whether he was a peaceable and lawabiding citizen, or concerning his honesty. A general question as to his reputation would include every element, whether material to the instant case or not. In Skidmore v. Bricker, 77 Ill. 164, it was held that where the prosecution witness made complaint of his own knowledge, not on information and belief, as was done in the instant case, it was error to permit witnesses to testify in a malicious prosecution case as to the reputation of plaintiff.

that it had terminated, and the jury should be informed that this was the sole purpose of its submission. Admiral v. Bickel, 238 Ill. App. 378. In the present case the court not only failed to limit the purpose for which the original case record was introduced, but by certain remarks and rulings apparently told the jury that the disposition of the original case was an admission that the defendant did not have probable cause to believe defendant guilty and to have his arrested. This was a prejudicial error.

Plaintiff was permitted to state that he sold out his interest in the bakery business to his partner, Steinhilber, some six months after the arrest because he "could make no business," thus leading the jury to infer that his business had suffered because of his arrest and that in consequence of this he had been forced to sell out.

Plaintiff sought to introduce evidence as to his reputation. Such evidence is inadmissible. Admiral v. Bickel, 238 Ill. App. 378. The method followed was highly improper. For instance, the character witness was asked: "What did people generally think of him in the neighborhood?" The answer was, "Absolutely good."

Another witness was asked: "Do you know his reputation?" (Objection) "A. Yes." "What his reputation good or bad at that time?" "A. Good." The question as to reputation should have indicated in what respect his reputation was good or bad, that is, whether he was a peaceable and law-abiding citizen, or concerning his honesty. A general question as to his reputation would include every element, whether material to the instant case or not. In Admiral v. Bickel, 238 Ill. App. 378, it was held that where the prosecution witness made a statement of his own knowledge, not on information and belief, as was done in the instant case, it was error to permit witnesses to testify in a malicious prosecution

Plaintiff testified that defendant ^{had} before the fire offered him \$5,000 for the bakery business, and that the stock of goods on the day of the fire was worth \$6,000. There was also much evidence as to the amount of business before and after the fire. There was a partnership between plaintiff and Stolnis, but there was no showing as to what interest plaintiff had in the business. It might have been a very small interest. At one time he testified that he had to hire a man to work in the store while he had attended court and paid him about \$100, and again said that he paid him "all kinds of prices, about ten or twelve dollars a day."

Plaintiff was asked on cross-examination whether he knew if any of the pipes in his store were taken down or not. Objection to this was improperly sustained. Plaintiff was also asked whether or not he was taking down the pipes and had been told by defendant he had no right to take them down. Objection to this question was improperly sustained.

Plaintiff having testified that the stock in his bakery was worth \$6,000 before the fire, it was proper to inquire whether he had any insurance on the goods. This testimony was excluded. Defendant was not permitted to testify as to whether any evidence was heard upon the trial of the criminal case at which defendant was present. Defendant should have been permitted to testify as to the amounts claimed by plaintiff to have been paid by him to someone to take his place while he was attending in the Municipal court.

The court instructed the jury that if they believed that plaintiff had "uniformly bore a reputation for being a peaceable and law-abiding citizen," and that defendant knew this, that then the jury should consider this in passing upon the good faith of defendant in swearing out the criminal complaint against plaintiff. There was no evidence touching the "peaceable and law-abiding" reputation of

and

Plaintiff testified that defendant before the fire cleared him \$2,500 for the heavy business, and that the stock of goods on the day of the fire was worth \$5,000. There was also some evidence as to the amount of business before and after the fire. There was a partnership between plaintiff and defendant, but there was no showing as to what interest plaintiff had in the business. It might have been a very small interest. At one time he testified that he had to hire a man to work in the store while he had attended court and paid him about \$100, and again said that he paid him "all kinds of prices, about ten or twelve dollars a day."

Plaintiff was asked on cross-examination whether he knew if any of the pipes in the store were taken down or not. Objection to this was improperly sustained. Plaintiff was also asked whether or not he was taking down the pipes and had been told by defendant he had no right to take them down. Objection to this question was improperly sustained.

Plaintiff having testified that the store in his bakery was worth \$2,500 before the fire, it was proper to inquire whether he had any insurance on the goods. This testimony was excluded. Defendant was not permitted to testify as to whether any evidence was heard upon the trial of the criminal case at which defendant was present. Defendant should have been permitted to testify as to the amounts claimed by plaintiff to have been paid by him to persons in case his place while he was attending in the municipal court.

The court instructed the jury that it they believed that defendant had "willfully sold & transferred the goods & proceeds and law-abiding citizen," and that defendant knew this, that then the jury should consider this in passing upon the good faith of defendant. It was not the province of the jury to consider whether or not there was no evidence tending to show "willful and law-abiding" reputation of

the plaintiff. Neither is there any basis in the evidence for the assumption that the defendant knew of his reputation. This instruction was improper.

We find no reversible error in the instruction on malice, taken in its entirety.

There was no evidence upon which to base the instruction to the jury that they might take into consideration the "physical pain or bodily suffering" of the plaintiff in fixing the damages.

Defendant argues that the verdict of the jury was excessive and the result of passion and prejudice. We are inclined to think there is merit in this point. The verdict was for \$7,700, which was remitted to \$5,700. We are inclined to think that upon the evidence a still larger remittitur might have been entered.

For the reason that the case was improperly tried, as indicated, we must reverse the judgment and remand the cause.

REVERSED AND REMANDED.

Matchett, J., concurs:

Mr. Justice O'Connor took no part in the consideration of this case.

the plaintiff. It is not in fact any basis in the evidence for the
assumption that the defendant knew of his negligence. This in-
formation was important.
We find no reversible error in the instruction on malice.
taken in its entirety.
There was no evidence upon which to base the instruction so
the jury that they might have been instructed on the "physical pain
or bodily suffering" of the plaintiff in taking the damages.
Defendant argues that the verdict of the jury was excessive
and the result of passion and prejudice. We are inclined to think
there is merit in this argument. The verdict was for \$7,500, which was
reduced to \$5,000. We are inclined to think that upon the evidence
a still larger verdict might have been reached.
For the reasons that the case was improperly tried, as indi-
cated, we must reverse the judgment and award the costs.
REVEREND THE COURT.

Witness, J. J. Conner.
Mr. Justice O'Connor took no part in the consideration of this case.

35862

CARL HANSEN, as Administrator to
Collect of the Estate of Ignatz
Swartz, Deceased,
Defendant in Error,

vs.

KATHERINE SWARTZ, ABRAM SHATZ and
LOUISE SWARTZ,
Plaintiffs in Error.

8 1 7
ERROR TO MUNICIPAL COURT
OF CHICAGO.

267 I.A. 615¹

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

By this writ of error defendants seek the reversal of a judgment of \$1180.37, entered upon the findings of the court in an action upon an appeal bond.

In the Probate court of Cook county defendant Katherine Swartz was ordered to turn over to Carl Hansen, as administrator of the estate of Ignatz Swartz, deceased, certain cash and securities and also certain articles of personal property. On appeal to the Circuit court this order was affirmed. Katherine Swartz then filed the appeal bond upon which this suit is brought, conditioned upon the successful prosecution of the appeal in the Supreme court. Subsequently this appeal was dismissed for want of prosecution. Suit was then brought on the appeal bond and judgment entered against the defendants for \$12,365.97, being the total amount of the value of the property involved as described in the final order of the Circuit court.

Subsequently a writ of error was sued out of the Supreme court by Katherine Swartz, which court reversed the Circuit court with respect to the cash and securities, and affirmed the order so far as it referred to the articles of personal property. Hansen, Admr. v. Swartz, 345 Ill. 609. On petition by defendants, subsequently filed, the Municipal court vacated the judgment entirely and the suit on the appeal bond was again tried and the instant judgment was rendered, based upon the value of the personal property

CARL HANSEN, as Administrator of the Estate of Ignatz Swartz, Deceased, Defendant in Error,

KATHERINE SWARTZ, Appellant, Plaintiff in Error,

887 I.A. 615

IN THE PROBATE COURT OF COOK COUNTY, ILLINOIS.
KATHERINE SWARTZ, Plaintiff, vs. CARL HANSEN, Defendant.

By this writ of error defendant seeks the reversal of a judgment of \$180.97, entered upon the findings of the court in an action upon an appeal bond.

In the Probate Court of Cook County defendant Katherine Swartz was ordered to turn over to Carl Hansen, as administrator of the estate of Ignatz Swartz, deceased, certain cash and securities and also certain articles of personal property. On appeal to the Circuit Court this order was affirmed. Katherine Swartz then filed the appeal bond upon which this suit is brought, conditioned upon the successful prosecution of the appeal in the Supreme Court. Subsequently this appeal was dismissed for want of prosecution. Suit was then brought on the appeal bond and judgment entered against the defendant for \$180.97, being the total amount of the value of the property involved as described in the final order of the Circuit Court.

Subsequently a writ of error was sued out of the Supreme Court by Katherine Swartz, which court reversed the Circuit Court with respect to the cash and securities, and affirmed the order so far as it related to the articles of personal property. Hansen, et al. vs. Swartz, 223 Ill. 509. On motion by defendant, which was granted, the Supreme Court vacated the judgment entirely.

as determined in the judgment order of the Circuit court.

We are inclined to agree with the suggestion of plaintiff's counsel that the Municipal court should not have vacated the judgment originally entered; that the proper practice would have been, upon the showing of the defendants that the Circuit court judgment had been affirmed in part and reversed in part, to have moved the court to reduce the judgment on the appeal bond to the amount of that part of the judgment which ^{was} affirmed by the Supreme court. However, this question is not presented to us by any assignments of error.

Defendants argue that no rights which accrued to the plaintiff by virtue of the partial affirmance of the decree could be enforced in an action commenced subsequently. We do not agree with this contention for the reason that by the dismissal of the appeal the plaintiff was entitled to bring suit upon the appeal bond and recover the full amount of the judgment appealed from. The subsequent order of the Supreme court in the writ of error proceeding simply gave the defendants a right to have the judgment reduced to the amount of the judgment which the Supreme court affirmed. Cases tending to support this view are McConnell v. Swailes, 2 Scam., 571; Sutherland v. Phelps, 22 Ill. 91; Realling v. Wachening, 174 Ill. App. 321.

The Circuit court order directed Katherine Swartz to pay over to plaintiff in twenty days all the securities, cash and property, or the value thereof as stated in the order. The condition of the appeal bond was that Katherine Swartz should perform all the conditions of the order and prosecute her appeal with effect and pay the amount of any judgment, with costs, interest and damages, which might be rendered against her in the event the judgment should be affirmed. There is no claim that any part of the judgment of the Circuit court was paid. Counsel for defendants,

as determined in the judgment of the Circuit Court.

The court is inclined to agree with the suggestion of plaintiff's counsel that the Municipal Court should not have vacated the judgment originally entered; that the proper action would have been, upon the showing of the defendant that the Circuit Court judgment had been affirmed in part and reversed in part, to have moved the court to reduce the judgment on the amount paid to the amount of that part of the judgment ^{was} affirmed by the Supreme Court. However, this question is not presented to us by any assignment of error.

It is further stated that on this point the court is in

plaintiff by virtue of the partial affirmance of the lower court's judgment in an action commenced subsequently. We do not agree with this contention for the reason that by the dismissal of the judgment the plaintiff was entitled to a new trial and not to a reversal of the judgment as such. The subsequent order of the Supreme Court in the writ of error proceeding simply gave the defendant a right to have the judgment reversed in the amount of the judgment which the lower court affirmed. First National Bank v. United States, 101 U.S. 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The Circuit Court which decided Banking Trust Co. v. ... over to plaintiff in equity gave all the securities, cash and property, on the value thereof as stated in the order. The condition of the special bond was that Banking Trust Co. should perform all the conditions of the order and prosecute her appeal with effect and pay the amount of any judgment, with costs, interest and damages, which might be rendered against her in the event the judgment should be affirmed. There is no claim that any part of the

states in his brief that the statement of claim contains no allegation to the effect that Katherine Swartz has not complied with the decree. This is an error. By plaintiff's amended statement of claim it is specifically alleged that she did not at any time pay or turn over to the plaintiff any of the property involved or the value thereof.

Counsel for plaintiff suggests that this writ of error is brought simply for the purpose of delaying the plaintiff in the recovery of his judgment and asks ten per cent damages. We are of the opinion there is no merit in the defense presented and that plaintiff's suggestion is well taken.

The judgment of the Municipal court is therefore affirmed and judgment against defendants of ten per cent. thereon, or \$118, is entered in this court as damages.

AFFIRMED WITH DAMAGES.

Matchett, J., concurs.

Mr. Justice O'Connor took no part in the consideration of this case.

stated in his brief that the statement of claim contains no allegation to the effect that Katherine Swartz has not complied with the decree. This is an error. By plaintiff's amended statement of claim it is specifically alleged that she did not at any time pay or turn over to the plaintiff any of the property involved or the value thereof.

Counsel for plaintiff suggests that this will of error is brought simply for the purpose of delaying the plaintiff in the recovery of his judgment and make ten per cent damages. We are of the opinion there is no merit in the defense presented and that plaintiff's suggestion is well taken.

The judgment of the Municipal court is therefore affirmed and judgment against defendants of ten per cent. damages, or \$112, is entered in this court as damages.

ENTERED THIS 22ND DAY OF

March 22, 1908.

Mr. Justice O'Connor took no part in the consideration of this case.

HERBERT ANDERSON,
Appellant,

vs.

CHARLES O. DOBROTH and
BERT M. WILLIAMS,
Appellees.

827
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

267 I.A. 615

MR. PRESIDING JUSTICE MCSURKLY
DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment entered upon verdict directed by the court at the conclusion of plaintiff's evidence upon the trial of an action brought under section 28 of the Workmen's Compensation act.

Frank Carver, an employee of plaintiff, was injured by falling from the third floor in a building under construction belonging to defendant Dobroth. Carver and plaintiff were subject to the provisions of the Workmen's Compensation act and Carver obtained an award from the Industrial Commission, which plaintiff paid to Carver as compensation for his injuries, and, under section 28 of the act, plaintiff became subrogated to Carver's rights against defendants. The claim was for \$9669.32.

The accident happened June 27, 1929. Plaintiff was a plastering and lathing contractor on Dobroth's building. Dobroth also had a contract with defendant Williams for all the carpentry work, including the laying of the floors; there were other contracts with other contractors for plumbing, electrical work, etc.

On the morning in question Carver was working on the third floor of the building. In the central portion was a stairway well or hole about eight feet across where the stairs were later to be built; alongside of this hole was a platform of ordinary planks laid against each other on the joists; in the course of construction the permanent flooring would be placed on top of this sub-flooring. Carver had walked along these planks while working; during the day

WILLIAM WOOD GILBERT COURT
IN CHIEF COURT

ROBERT ANDERSON,
Appellant,
vs.
EMILIE C. ANDERSON and
HERT M. WILLIAMS,
Appellees.

2671A.012

W. W. GILBERT, CLERK OF COURT
JULY 10, 1930

Plaintiff appears from an abstract judgment entered upon
verdict directed by the court at the conclusion of plaintiff's evi-
dence upon the trial of an action brought under section 16 of the
Workmen's Compensation Act.
The plaintiff, an employee of defendant, was injured by
falling from the roof of a building under construction
belonging to defendant. Plaintiff and defendant were subject
to the provisions of the Workmen's Compensation Act and under ap-
plied an award from the Industrial Commission, which plaintiff
paid to plaintiff as compensation for his injuries, and, under section
16 of the Act, plaintiff became entitled to recover a sum
against defendant. The claim was for \$1000.00.
The accident happened June 27, 1929. Plaintiff was a
mastering and laying contractor on defendant's building. Defendant
also had a contract with defendant Williams for all the masonry
work, including the laying of the floors; there were other contracts
with other contractors for plumbing, electrical work, etc.
On the morning in question defendant was working on the third
floor of the building. In the central portion was a stairway well
as wide about eight feet across where the stairs were later to be
built; alongside of this well was a platform of ordinary stone
laid against each other on the joists; in the center of construction
the ground of building was to be used as part of this platform.

Carver approached the well hole with the intention of making a scaffold across the well hole upon which he could stand and plaster the adjacent walls; the ends of the sub-planks projected into the well hole from 6 to 8 inches; he stepped on the end of one of these sub-flooring planks and not being nailed to the joist it tipped over, throwing Carver down the well hole; he fell into the basement and received injuries for which he was awarded compensation.

Carver testified that before he stepped on the plank he did not know that it was not nailed. Plaintiff testified that after the accident he went to the landing on the third floor and examined the sub-floor planks and found that a number of them had not been nailed, and that both the nailed and unnailed planks extended into the well hole in various lengths.

Plaintiff offered to prove that in the construction of such buildings it was customary to nail the sub-floor planks to the joists, two nails to each plank, and, that Carver knew of this and relied upon it; that whether they were nailed or not would not be noticed on casual inspection. The court excluded this evidence. We are of the opinion this was admissible. Proof of a customary method of doing a certain act is evidence as to whether the failure to conform with this customary method is or is not negligence.

Fowler v. Chicago Ry. Co., 285 Ill. 196.

The position of the defendants seems to be that the declaration charged specific negligence and not the violation of any custom. We do not so read the declaration. It is a charge of general negligence and the evidence as to the customary way of laying the sub-flooring should have been admitted. This is in accordance with the holding in Sturm v. Consolidated Coal Co., 248 Ill. 20; Campbell v. C. & N. W. Ry. Co., 243 Ill. 620; Francy v. Union Stockyards Co., 235 Ill. 522; North Chicago Railway v. Irwin, 202 Ill. 345, and many other cases. The cases cited by defendants are not in conflict with these decisions. They are

cases which held that evidence as to custom was incompetent because the custom was not applicable to the circumstances of the particular case presented. Such a case was O'Dell v. Vandalia R. R. Co., 149 Ill. App. 618. In Reidler v. Branshaw, 298 Ill. 425, the evidence of an expert as to how other freight elevators were constructed in Chicago was held inadmissible, the court saying that the only question to be determined was the construction of the particular elevator shaft in question.

Plaintiff offered to show that defendant Williams in a conversation with plaintiff admitted that his employees should have nailed the sub-flooring planks to the joists. Objection to this was sustained. This should have been admitted. It is a general rule that declarations of a party are admissible in evidence against him on the principle that what he says against interest may be considered true. Smith v. Gray, 316 Ill. 488; Probasco v. Crana Co., 238 Ill. App. 237.

Carver testified that when he started to work he looked at the planks in question and "that they appeared in good order," and subsequently explained that he meant they appeared to be in place. Objection to this testimony was improperly sustained. We also think the evidence as to the expenses of going by taxi cab to the doctor's office for treatment of his injuries was admissible.

The defendant Williams owed to plaintiff's employees the duty of performing his work in such a manner as not negligently to injure other persons employed in and about the building. Flanagan v. Wells Bros. Co., 237 Ill. 32. As has been concisely stated in Fetzer v. Noel Construction Co., 175 Ill. App. 401, "The law is well settled that a contractor whose servants are engaged upon work about which the servants of another contractor are also engaged, owes the duty of ordinary care in prosecuting his work in such a way as not negligently to injure the servants of the other."

Even without the excluded evidence the question of the

cases which held that evidence as to character was incompetent because the question was not applicable to the circumstances of the particular case presented. Such a case was Wright v. Vanhook, 111 Ill. App. 610. In Wright v. Wright, 200 Ill. 433, the evidence of an expert as to how other foreign characters were conducted in Chicago was held inadmissible, the court saying that the only question to be determined was the character of the particular character for theft in question.

Winnitt offered to show that defendant Williams in a conversation with plaintiff admitted that his employees should have called the telephone number of the hotel. It is a general rule that declarations of a party are admissible in evidence against him on the principle that when he says against interest may be considered true. Wright v. Wright, 200 Ill. 433; Wright v. Wright, 200 Ill. App. 610.

Garver testified that when he started to work he looked at the blank in question and that they appeared in good order, and subsequently explained that he meant they appeared to be in place. In this statement the testimony was contradictory. He also stated the evidence as to the manner of going by taxi cab to the doctor's office the treatment of his injuries was inadmissible.

The defendant Williams owed to plaintiff's employees the duty of performing his work in such a manner as not negligently to injure them because employed in and about the building. Wright v. Wright, 200 Ill. App. 610. He has been conclusively stated in Wright v. Wright, 200 Ill. App. 610, "The law is well settled that a contractor whose servants are engaged upon work should also be responsible of another contractor who also engaged, and the duty of ordinary care in procuring his work in such a way

negligence of the defendant Williams and the contributory negligence of Carver should have been submitted to the jury. But with the evidence admitted, which, as we have indicated, was improperly excluded, the liability, if any, of Williams was clearly for the jury to determine. It has been so repeatedly held that questions of negligence are ordinarily for the jury to determine as to make citation of decided cases superfluous.

The case of defendant Dobroth stands on a different footing than that of defendant Williams. Dobroth was the owner of the land upon which the building was being erected and had plans and specifications drawn and submitted to various contractors for bids. Plaintiff Anderson was given the plastering contract and defendant Williams the contract for the carpentry work; these contractors, with others, proceeded with the work. Dobroth himself did no work on the building; he would examine it daily in order to check up as to whether the work was being done according to the plans and specifications; he had no direction or control over Williams or any of the other contractors as to the method of doing their work. The accident occurred while the building was in the course of construction and while it was in the possession and control of the various contractors; the sub-flooring around the well hole was laid by Williams under his contract, which also called for the laying of the permanent flooring. Williams was an independent contractor. "An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result." The owner of the land on which a building is being erected for him by an independent contractor is not liable in damages for an injury to anyone due to the contractor's negligence." Rosenbaum Bros. v. Devine, 271 Ill. 354; Pioneer Construction Co. v. Hansen, 176 Ill. 100; Paster v. City of Chicago, 197 Ill. 264; Boyd v. C. & N. W. Ry. Co., 217 Ill. 332; Maradesia Levee Dist. v. Industrial Commission, 285 Ill. 63; Indianapolis Refining Co. v. Industrial Commission,

agreement of the defendant William and the plaintiff Robert
of Garver should have been assigned to the jury. But with the
evidence admitted, which, as we have indicated, was immaterially
the liability, if any, of William was clearly for the jury to de-
termine. It has been repeatedly held that questions of negli-
gence are ordinarily for the jury to determine as to some mis-
take of fact.

The case of defendant Robert stands on a different footing
than that of defendant William. Robert was the owner of the land
upon which the building was being erected and had plans and speci-
fications drawn and written in relation thereto.

With Antonio was given the planning contract and defendant
William the contract for the carpentry work; these contracts, with
specifications and plans, were given to the contractor.

William was to be in charge of the work in order to see that
whether the work was being done according to the plans and speci-
fications; he was to have supervision or control over William or any of the
other contractors as to the method of doing their work. The assistant

superintendent while the building was in the course of construction and
while it was in the possession and control of the various contrac-
tors; the superintendent around the well hole was laid by William

under his contract, which was called for the laying of the permanent
flooring. William was an independent contractor. An independent

contractor is one who undertakes to perform a given result without
being in any way controlled as to the method by which he achieves that
result. The owner of the land on which a building is being erected

for the purpose of independent contractor is not liable for the
defects in work done by the contractor's employees. *Boyle v. Boyle*, 101 Ill. 2d 100; *Boyle v. Boyle*, 101 Ill. 2d 100; *Boyle v. Boyle*, 101 Ill. 2d 100.

311 Ill. 153.

Plaintiff cites Calvert v. Springfield Electric Co., 231 Ill. 290, as holding the owner of premises liable for injuries to a workman. The facts in that case are quite different from those under consideration. There the defendant was the owner of a building on which a workman was injured by falling through the roof; the roof was composed of boards covered with tar paper, and, while the tar paper remained intact some of the boards underneath were splintered and broken; the owner presumably knew this; he employed a contractor to do certain work on the roof and one of the contractor's employees while at work on the roof, which apparently was safe, broke through, fell and was killed. It was held that the broken and unsafe boards constituted a danger known to the owner and unknown to the workmen on the roof; that the owner should have notified the workmen of this danger and his failure to do so was negligence. In the instant case the owner, Dobroth, was not in control of the premises, neither did he know that some of the sub-floor boards were not nailed down, and had no occasion or reason to learn of this condition. The record fails to show any liability of defendant Dobroth.

The judgment must be reversed and the cause remanded. But defendant Dobroth urges strongly against a remandment as to him and asks that judgment of nul capiut be entered here as to him. We agree with the suggestions as to the desirability of such practice, but however much we may be disposed to do this we are compelled by the definite statements appearing in the reported decisions in this state to hold that a judgment void as to one defendant is void as to both, and, that it cannot be affirmed as to one and reversed as to the other, but must be reversed as an entirety.

The fact that in most of the cases so holding there was a judgment against joint defendants, does not necessarily demand a different procedure when the judgment is against ^a plaintiff and

[illegible]

The fact that in most of the cases no holding there was a reversed as to the other, but may be reversed as an entirety.

This case he said that a judgment void as to one defendant is void as to both, and that it cannot be affirmed as to one and reversed as to the other, but may be reversed as an entirety.

We the delicate situation appearing in the reported decision in this case we may be disposed to do this as was suggested by the majority of the court in the case of Harris v. United States, 307 U.S. 298, 61 S.Ct. 578, 83 L.Ed. 681, 1944-1-1.

The judgment must be reversed and the cause remanded. The

in favor of two or more defendants. In Seymour v. Richardson Fueling Co., 205 Ill. 77, the court quoted with approval from Black on Judgments (vol. 1, - 2nd ed. - sec. 211) to the effect that a judgment "if in favor of defendants, invalidity as to one will vitiate it as to all." In Covenant Club of Chicago v. Thompson, 247 Ill. App. 122, the court said: "The judgment was against the plaintiff and in favor of all of the defendants. It is a unit as to all of the defendants and if erroneous as to one it is erroneous as to all. It cannot be reversed as to one and affirmed as to others." We think the reasoning of the court in Livak v. Chicago & Erie Railroad, 299 Ill. 219, is decisive, and we therefore hold that the judgment in favor of the defendants was a unit and must be acted upon as a whole.

For the reasons above indicated, we hold that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, J., and Matchett, J., concur.

Noted page

in favor of two or more defendants. In People v. Alexander, 100 Ill. 27, the court said that it is not an
injunction (vol. 1, - 2nd ed. - sec. 211) in the strict sense of
the word "it is in favor of defendants, invalidly as to one will
be invalid as to all." In People v. Jones, 100 Ill. 27, the court said: "The judgment was against the
plaintiff and in favor of all of the defendants. It is a writ as
to all of the defendants and if erroneous as to one it is erroneous
as to all. It cannot be reversed as to one and affirmed as to
others." We think the reasoning of the court in People v. Jones is
correct, and we therefore hold that
the judgment is valid as to all defendants and a writ will be
granted upon the whole.

For the reasons above stated, we hold that the judgment
must be reversed and the case remanded.

REVEREND JUSTICE

O'Connor, J., and McPherson, J., concur.

HERBERT ANDERSON, Appellant,)

vs.)

CHARLES O. DOBROTH and
BERT M. WILLIAMS, Appellees.)APPEAL FROM
CIRCUIT COURT OF COOK COUNTYSUPPLEMENTAL OPINION

Counsel for defendant Dobroth renew their request that judgment of nil capiat as to him be entered in this court, as authorized by Section 110, Practice Act. It is conceded that the judgment, being a unit, must be reversed as to both defendants, but it is argued that it is not inconsistent with the cases above cited to remand as to only one of the defendants and to enter the proper judgment in this court as to the other defendant. The only cases where this has been done are, Freeman v. Dixon, 233 Ill. App. 196, and Singer v. Cross, 257 Ill. App. 41. The procedure commends itself to us. It would be useless to remand for another trial as to Dobroth. Upon the undisputed facts, as a matter of law he cannot be held liable. To end the case in this court as to him is consonant with economy and common sense.

The judgment of reversal as to both defendants will stand and the cause is remanded as to defendant Williams, and, judgment of nil capiat as to defendant Dobroth will be entered in this court and the petition for rehearing denied.

7-27-32

ALBERT W. BROWN
CLERK OF COURT OF COOK COUNTY

RECEIVED
JAN 10 1900
COURT OF COOK COUNTY
CLERK OF COURT

RETURN OF JURY

Counsel for defendant Brown moves their request
that judgment of nil ought as to him be entered in this court,
as authorized by Section 110, Criminal Code. It is contended that
the judgment, being a writ, must be reversed as to both defendants,
but it is argued that it is not inconsistent with the cases above
cited to remand as to only one of the defendants and to enter the
proper judgment in this court as to the other defendant. The only
cases where this has been done are, People v. Brown, 111 Ill. 437,
50, and People v. Brown, 111 Ill. 437, 44. The People's argument
is to us. It would be useless to remand for another trial as
to Brown. Upon the undisputed facts, as a matter of law he
cannot be held liable. To end the case in this court as to him is
necessary and proper.
The judgment of reversal as to both defendants will
stand and the case is remanded as to defendant William, and
judgment of nil ought as to defendant Brown will be entered in
this court and the petition for rehearing denied.

35938

NORTHERN PICTURE FRAME COMPANY,)
a Corporation,)
Appellee,)
vs.)
VICTOR A. DORSEY,)
Appellant.)

83
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 615³

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover payment for a desk delivered to defendant and for certain alterations, upon trial by the court had judgment for \$873.09, from which defendant appeals.

Quentin J. Hallburg is in the business of interior decorating in which he sells furniture and other goods for furnishing homes. He was engaged to do some work in defendant's home, including installing a desk. Pursuant to this arrangement Hallburg ordered the desk from plaintiff to be delivered to defendant and billed and charged it to him at \$550, which included 10% for Hallburg's services; the desk was delivered to defendant's home and subsequently certain alterations were made by plaintiff, all of which was charged by Hallburg to defendant. Defendant testified that he paid Hallburg everything he owed with the exception of approximately \$325, which balance Hallburg had assigned to a third party.

Plaintiff manufactures "special furniture and decorative specialties" and Hallburg had an open account with it for goods purchased from time to time. Herman Andresen, an official of the plaintiff, received the order from Hallburg for the desk to be delivered to defendant. Andresen says he told Hallburg that he (Hallburg) still owed plaintiff for other goods purchased and plaintiff refused to sell him the desk on his open account, and that Hallburg told him to send the desk and bill to defendant who would pay for it. A statement of the open account of plaintiff with Hallburg shows that both the desk and the cost of the alterations were charged to Hallburg. There was also an invoice made

NORTHAMPTON COUNTY COURT,
 N. C.
 VICTOR L. COBBETT,
 Plaintiff,
 vs.
 GEORGE L. COBBETT,
 Defendant.

RETURNED FROM NORTHERN COURT
 ON CHARGE.

268 L.A. 015

MR. PRESIDENT, THE COURT REQUESTS
 THAT YOU RETURN THE COPIES OF THE COURT.

Plaintiff, bringing suit to recover payment for a cash

delivered to defendant and for certain alterations, upon trial by

the court had judgment for \$285.00, from which defendant appeals.

Quentin L. Halliburton is in the business of interior decorating

in which he sells furniture and other goods for remodeling houses.

He was engaged to do some work in defendant's home, including in-

stalling a book. Pursuant to this arrangement Halliburton ordered the

book from plaintiff to be delivered to defendant and billed and

charged it to him at \$550, which included 10% for Halliburton's services;

the book was delivered to defendant's home and subsequently certain

alterations were made by plaintiff, all of which was charged by Halli-

burton to defendant. Defendant testified that he paid Halliburton every-

thing he owed him the exception of approximately \$385, which balance

Halliburton had assigned to a third party.

Plaintiff submitted "Special Findings and Conclusions"

and Halliburton had an open account with it for goods

purchased from time to time. Between January, an official of

the plaintiff, received the order from Halliburton for the book and

he delivered to defendant. Anderson says he told Halliburton that he

(Halliburton) still owed plaintiff for other goods purchased and

plaintiff refused to sell him the book on his open account, and

that Halliburton told him he was not to pay for the book until the

would pay for it. A statement of the open account of plaintiff

out by plaintiff showing that this desk was charged to Hallburg.

Plaintiff argues that Hallburg in ordering the desk acted as the agent of defendant. We cannot agree with this contention. Hallburg and the defendant were contracting as principals with regard to the desk and there was no contractual relation between the defendant and plaintiff, the manufacturer of the desk.

The documents rather discredit Andresen's testimony that Hallburg told plaintiff defendant would pay for the desk, for it was charged by plaintiff to Hallburg's account and not to the defendant. It should be noted that this was charged to Hallburg on December 26, 1929, and subsequent items appear in the Hallburg statement which show that plaintiff continued to sell his goods on open account as late as May 21, 1930.

In Hallburg's account with plaintiff the desk was charged to him at \$500. This confirms defendant's testimony that he agreed to pay Hallburg this amount for the desk, plus 10% for Hallburg's services. In this suit plaintiff seeks to obtain \$750 as the price of the desk. However, what Hallburg may have told plaintiff would not bind defendant.

Andresen testified that in subsequent telephone conversations defendant promised to pay plaintiff for the desk. This is denied by the defendant. In view of the payment by defendant to Hallburg, it is hardly believable that he would also agree to pay plaintiff for the same thing. But in any event, such a promise would not be binding on defendant, as no promise to make payment of the debt of another is binding unless made in writing.

The facts establish that Hallburg in this transaction was an independent contractor dealing with the defendant, and therefore defendant was obligated only to him and not to the plaintiff.

We hold that the judgment was erroneously entered and it is therefore reversed with a finding of facts, and as there could be no recovery judgment for defendant will be entered in this court.

REVERSED WITH FINDING OF FACTS AND JUDGMENT HERE.

Matchett and O'Connor, JJ., concur.

and a plaintiff answered that this book was assigned to Haliburg.

Plaintiff argued that Haliburg is ordering the book noted

as the agent of defendant. He cannot agree with this contention.

Haliburg and the defendant were conversing on telephone with

regard to the book and there was no conversation between

the defendant and plaintiff, the manufacturer of the book.

The defendant's agent, Haliburg, testified that

Haliburg told plaintiff defendant would pay for the book, and it

was assigned by plaintiff to Haliburg's account and not to the de-

fendant. It should be noted that this was assigned to Haliburg on

December 22, 1935, and subsequent items assigned to Haliburg on

statements which show that plaintiff continued to bill the books on

open account as late as May 27, 1936.

In Haliburg's account, the defendant's agent was assigned

to him as \$500. This contention defendant's testimony that he agreed

to pay Haliburg this amount for the book, since 1935 for Haliburg's

services. In this suit plaintiff seeks to obtain \$750 as the price

of the book. However, since Haliburg may have paid plaintiff would

not find defendant.

Another testified that in subsequent telephone conversations

defendant or agent as per plaintiff for the book. This is denied

by the defendant. In view of the payment by defendant to Haliburg,

it is hardly believable that he would also agree to pay plaintiff

the same thing. But as my wife, when a witness would not be

liking on defendant, so we promise to make payment of the debt of

another is doing what we are doing.

The facts regarding that Haliburg is with defendant was an

independent contract dealing with the defendant, and therefore the

defendant was obligated only to him and not to the plaintiff.

We held that the defendant was erroneously entered and it is

therefore reversed with a finding of facts, and an order shall be so

reversal judgment for defendant will be entered in this court.

We find that Hallburg was not the agent of the defendant with respect to the purchase of the desk in question and the alterations thereon; that Hallburg was an independent contractor dealing with the defendant; that the defendant did not promise to pay plaintiff for the desk, and that even if such promise were made it was oral and not binding on the defendant.

of the first century was not the same as the second

and was not the same as the third and fourth

and was not the same as the fifth and sixth

and was not the same as the seventh and eighth

and was not the same as the ninth and tenth

and was not the same as the eleventh and twelfth

36063

THE NEW YORK, CHICAGO & ST. LOUIS
RAILROAD COMPANY,

Appellant,

vs.

S. J. ROSENTHAL,

Appellee.

84 A
APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

267 I.A. 615⁴

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for \$73.28 as a balance due on freight charges. Defendant filed an affidavit of merits, in which, plaintiff says, there was no denial of the material allegations of its statement of claim. Judgment was requested upon the pleadings, which was denied by the court and judgment for defendant was entered without hearing any evidence. Defendant does not appear in this court to defend the judgment.

The statement of claim alleged that plaintiff was a corporation duly organized and existing under the laws of the State of Illinois, engaged in the business of a common carrier under the Interstate Commerce Act; that on March 11, 1929, the J. Sokol Manufacturing Company shipped 5,060 pounds of imitation leather bags, under a bill of lading issued by The Delaware, Lackawana & Western Railroad Company from New York City, consigned to the defendant at Chicago; that this shipment was duly carried over the lines of the D. L. & W. railroad and over the lines of plaintiff and delivered to the defendant consignee; that there accrued on this shipment, in accordance with the schedules of said carriers, freight charges to the amount of \$86.22, of which \$12.94 had been paid, leaving still due \$73.28.

Defendant's amended affidavit of merits did not deny any of the material allegations of the statement of claim, but alleged that the merchandise referred to was not ordered by defendant

THE NEW YORK, CHICAGO & ST. LOUIS
RAILROAD COMPANY,

Appellant,

vs.

E. J. ROSENTHAL,

Appellee.

OF CHICAGO.

FOR THE FIRST NATIONAL BANK

208 I.A. 615

IN THE SUPREME COURT OF THE UNITED STATES
PRAISED THE OPINION OF THE COURT.

Plaintiff brought suit for \$75.00 as a balance due on

freight charges. Defendant filed an affidavit of merits, in which

plaintiff says, there was no denial of the material allegations of

its statement of claim. Judgment was rendered upon the pleadings,

which was denied by the court and judgment for defendant was en-

tered without hearing any evidence. Defendant does not appear

in this court to defend the judgment.

The statement of claim alleged that plaintiff was a cor-

poration duly organized and existing under the laws of the State

of Illinois, engaged in the business of a common carrier under

the Interstate Commerce Act; that on or about May 1, 1930, the J. Schol

Manufacturing Company shipped 6,000 pounds of imitation leather

bags, under a bill of lading issued by The Delaware, Lackawanna &

Western Railroad Company from New York City, consigned to the

defendant at Chicago; that this shipment was duly carried over the

lines of the D. L. & W. Railroad and over the lines of plaintiff

and delivered to the defendant consignee; that there accrued on

this shipment, in accordance with the schedule of said carriers,

freight charges to the amount of \$65.32, of which \$12.32 had been

paid, leaving still due \$53.00.

Defendant's amended affidavit of merits did not deny any

of the material allegations of the statement of claim, but alleged

from the consignor; that defendant held the merchandise to secure the payment from the consignor of any accruing freight charges; that plaintiff released the defendant from all claims for freight charges and instructed the defendant to return the merchandise to the consignor, and that the defendant accordingly reshipped the merchandise to the consignor and that plaintiff is thereby estopped from claiming any charges from the defendant.

It is an established rule of court that all averments of fact in the statement of claim not denied specifically or by necessary implication are taken as admitted. Cooper v. Anderson, 246 Ill. App. 1.

It is also well established that a consignee, by accepting delivery of merchandise, becomes liable as a matter of law for the full amount of the freight charges, and that the only defenses available to one who has accepted the shipment are payment and the running of the statute of limitations. P. C. C. & St. L. Ry. Co. v. Fink, 250 U. S. 577; N. Y. C. & H. R. R. Co. v. York & Whitney Co., 256 U. S. 406; L. & N. R. Co. v. Central Iron & Coal Co., 265 U. S. 59; N. Y. C. R. Co. v. Philadelphia & Reading Coal & Iron Co., 286 Ill. 267.

The judgment of the Municipal court is improper. It is therefore reversed and judgment for plaintiff for \$73.28 is entered in this court.

REVERSED AND JUDGMENT HERE.

Matchett, J., concurs.

Mr. Justice O'Connor took no part in the consideration of this case.

from the consignee; that defendant held the merchandise to secure the payment from the consignee of any accruing freight charges; that plaintiff released the defendant from all claims for freight charges and instructed the defendant to return the merchandise to the consignee, and that the defendant accordingly testifies that merchandise to the consignee and that plaintiff is thereby estopped from claiming any charges from the defendant.

It is an established rule of courts that all averments of fact in the statement of claim not denied specifically or by necessary implication are taken as admitted. Wheeler v. Anderson, 248 Ill. App. 1.

It is also well established that a consignor, by accepting delivery of merchandise, becomes liable as a matter of law for the full amount of the freight charges, and that the only defense available to one who has accepted the shipment and payment and the turning of the goods to the consignee. W. C. E. & M. v. E. C. Co.

W. C. E. & M. v. E. C. Co., 230 Ill. 237; W. C. E. & M. v. E. C. Co., 230 Ill. 237; W. C. E. & M. v. E. C. Co., 230 Ill. 237; W. C. E. & M. v. E. C. Co., 230 Ill. 237; W. C. E. & M. v. E. C. Co., 230 Ill. 237.

The judgment of the municipal court is improper. It is therefore reversed and judgment for plaintiff for \$35.28 is entered in this court.

REVEREND AND JUDGMENT HERE,
Mr. Justice O'Connor took no part in the consideration of this case.

35606

GEORGE BURDEN,
Appellee,

v.

RISSEMAN LUMBER & SUPPLY
CO., et al.,
Appellants.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

267 I.A. 616¹

MR. JUSTICE WATCHEIT DELIVERED THE OPINION OF THE COURT.

June 29, 1928, a judgment of \$924 was entered in favor of George Burden and against R. A. Goldman and Rissman Lumber & Supply Company. The judgment was entered upon an award of the Industrial Commission pursuant to the provisions of the Workmen's Compensation act (Smith-Hurd's Ill. Revised Stats., 1931, chap. 48, sec. 156.) In June, 1931, an execution issued and was served on the Rissman Lumber & Supply Co., which thereupon filed its petition praying that the judgment might be vacated, the records corrected and the execution against it stayed.

The petition was duly verified and averred that the Rissman Lumber & Supply Co. was an Illinois corporation, having its place of business at 3800 Milwaukee avenue, Chicago; that prior to November 9, 1928, R. A. Goldman was employed by it as a solicitor and estimator; that Goldman also had an independent business at 16th and State streets in which the Rissman Co. had no interest; that on November 9, 1928, a letter was addressed to the Rissman Lumber & Supply Co. in connection with an accident which occurred in the yard conducted by Goldman at 16th and State streets; that the letter was received by Goldman but that he did not disclose the contents thereof to any officer or director of the corporation; that without knowledge of the Rissman Co.,

correspondence was had with the Industrial Commission, although the company had no branch office at 16th and State streets and had no connection therewith; that without notice or knowledge on the part of any officer or director of the corporation, proceedings were commenced before the Industrial Commission on May 1, 1928; that without notice to the Riseman Co., Goldman by agreement became a defendant thereto; that without notice to the Riseman Co., it was stipulated between counsel for the parties that plaintiff was working under and subject to the Workmen's Compensation act for Goldman on February 3, 1928, and that he sustained an injury in the course of his employment and that notice and demand for compensation was given to Goldman within the required time and that the wages were in excess of \$28 per week and that medical aid was furnished and that Goldman paid \$38 and that the only issue so far as Goldman was concerned was the nature and extent of the injury and the amount of compensation.

The petition further averred that at said proceeding and after such stipulation the arbitrators stated that the question so far as the Riseman Lumber & Supply Co. was concerned was whether plaintiff on February 3, 1928, was working under or for the Riseman Lumber & Supply Co. and under and subject to the Workmen's Compensation act; that a Mr. Kelly, who represented Goldman, stated that this was true; that the only evidence as to the liability of the Riseman Co. was given by plaintiff, who testified that on February 3, 1928, he was working for the Riseman Co. and for Goldman, and that thereafter he received compensation of \$38 from Goldman; that no proof was ever offered that plaintiff was employed by the Riseman Co., and that no demand was ever made by him upon it; that without notice to the Riseman Co. the Industrial Commission made its award June 14, 1928, for a lump settlement of \$376.73, and that this lump settlement order was delivered to Goldman's attorney and not to the Riseman Co.; that

WCMG

100-443887-100

100-443886-100

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

[illegible]

The petition was duly verified and sworn that the
Elihu Lumber & Supply Co. was an Illinois corporation, having
its place of business at 2000 Milwaukee Avenue, Chicago; that
prior to November 9, 1938, E. A. Goldman was employed by it as
a collector and estimator; that Goldman also had an independent
business at 1818 and 1820 streets in which the Elihu Lumber Co. had
no interest; that on November 9, 1938, a letter was addressed to
the Elihu Lumber & Supply Co. in connection with an account
which appeared in the year conducted by Goldman at 1818 and 1820
streets; that the letter was received by Goldman but that he did

correspondence was had with the Industrial Commission, although the company had no branch office at 16th and State streets and had no connection therewith; that without notice or knowledge on the part of any officer or director of the corporation, proceedings were commenced before the Industrial Commission on May 1, 1928; that without notice to the Risman Co., Goldman by agreement became a defendant thereto; that without notice to the Risman Co., it was stipulated between counsel for the parties that plaintiff was working under and subject to the Workmen's Compensation act for Goldman on February 3, 1928, and that he sustained an injury in the course of his employment and that notice and demand for compensation was given to Goldman within the required time and that the wages were in excess of \$28 per week and that medical aid was furnished and that Goldman paid \$38 and that the only issue so far as Goldman was concerned was the nature and extent of the injury and the amount of compensation.

The petition further averred that at said proceeding and after such stipulation the arbitrators stated that the question so far as the Risman Lumber & Supply Co. was concerned was whether plaintiff on February 3, 1928, was working under or for the Risman Lumber & Supply Co. and under and subject to the Workmen's Compensation act; that a Mr. Kelly, who represented Goldman, stated that this was true; that the only evidence as to the liability of the Risman Co. was given by plaintiff, who testified that on February 3, 1928, he was working for the Risman Co. and for Goldman, and that thereafter he received compensation of \$38 from Goldman; that no proof was ever offered that plaintiff was employed by the Risman Co., and that no demand was ever made by him upon it; that without notice to the Risman Co. the Industrial Commission made its award June 14, 1928, for a lump settlement of \$876.73, and that this lump settlement order was delivered to Goldman's attorney and not to the Risman Co.; that

on June 27, 1933, a notice was served on the Plaintiff, J. and William
of 1414 and State streets by one Johnson of an application to be
made on June 28th and that the Plaintiff was then for the first
time informed of the application and advised the notice to the
Plaintiff, as attorney. That this attorney appeared in court on
June 28th in response to the notice but that no one appeared in
behalf of plaintiff, and that defendant informed the Plaintiff Co.
that the notice was withdrawn and no order was entered; that the
Plaintiff Co. never informed that it filed any notice to show cause
in court on the next day and presented the order which was entered
that it was to return the Plaintiff Co. the entry of the judgment
was concealed from it and no attention was taken and well covered
there and kept, and that upon the return of the motion the
Plaintiff Co. communicated with Johnson and it was told not to pay
attention to this judgment as it was pronounced against Johnson and
the Plaintiff Co., not Inc., the entry of the opinion that this and the
company under which Johnson was doing business and it was not intended
that the Plaintiff Co. should sue against the Plaintiff Co. as defendant;
that Johnson then asked the Plaintiff Co. not to take any steps to reverse
the judgment as he did not intend to interfere in against the company
but would enforce it against Johnson only; that payment to that extent
should be made to Johnson the amount of money and collected within
amounted in excess of the judgment and that no steps were taken to
reverse the judgment against the Plaintiff Co. until June 1934, when
an execution was served on the Plaintiff Co. saying that money should be
paid to Johnson for the purpose of reversing the judgment; that with
knowledge of the facts that the Plaintiff Co. was not a party to the
transaction in which the judgment was entered with knowledge of the
statement and with knowledge that the judgment had been paid through

property of the Riseman Co. and a custodian placed on the premises.

The prayer of the petition was that the judgment might be vacated and the records corrected to show that the judgment was entered against Selzman either in his own name or as trading under the name of the Riseman Lumber & Supply Co., if he did trade under such name, and that the execution against the Riseman Co. might be stayed and such orders as the court might deem proper made.

Plaintiff filed a demurrer to the petition which was overruled whereupon he answered denying that the full amount of the judgment had been paid but admitting that \$250 had been recovered in a garnishment proceeding and that \$300 had been recovered on account of a judgment by confession against the Garrett Biblical Institute and that there remained due on the judgment the sum of \$605 and costs. The answer further denied all other material matters and that the Riseman Co. was entitled to relief other than a remittitur paid on account of the judgment.

On December 21, 1931, the matter came on for hearing before Judge Pomeroy in the Circuit court, whereupon on motion of the attorney for plaintiff the court entered an order which recited that the cause came on to be heard on the petition, "and it appearing to the court that the said judgment heretofore entered by this court on, to-wit, the 29th day of June, A. D. 1928, was entered under and by virtue of the Workmen's Compensation Act, chapter 48, Revised Statutes of Illinois, and that this court is without jurisdiction to entertain the motion of the said petitioner; It is therefore ordered that the motion to vacate be and the same is hereby denied; It is further ordered that the order of this court heretofore entered on, to-wit, June 26, 1931, staying execution and the levy made thereon be and the same is hereby vacated and set aside." From that order the Riseman Lumber & Supply Co. prosecutes this appeal.

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entered against ... either in his own name or as ... under
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It is urged that the court had jurisdiction under section 89 of the Practice act, and that the court could correct an error in form without any petition on a mere motion. Mokol Co. v. Cunningham 231 Ill. App. 154, and other cases are cited to that effect. It is also urged that the court has jurisdiction over its judgments and will stay the collection of a paid judgment and order it satisfied of record, on the authority of Hardy v. Hawkins, 141 Ill. 572; Handel v. Curry, 254 Ill. App. 36; that the court has power to vacate a judgment at any time after the expiration of the term, where the court was without jurisdiction to enter the judgment, and that this rule is applicable in statutory proceedings (Keeler v. People, 160 Ill. 179; City of Chicago v. Hodeck, 302 Ill. 257; Village of Delton v. Delton, 331 Ill. 88); that in cases where a court of general jurisdiction is exercising special or limited powers or where a court has limited jurisdiction nothing is taken by intendment in favor of the jurisdiction (City of Chicago v. Witt, 334 Ill. 616; City of Chicago v. Hodeck, 302 Ill. 257); further that the petition might be treated as a common law writ of certiorari under which the circuit court exercising its general jurisdiction would have the power to review its restricted jurisdiction in the statutory proceeding (Brown v. Van Kuren, 340 Ill. 113), and finally that this court has jurisdiction to review the action of the circuit court in denying the motion to vacate the judgment and in dismissing the petition (City of Park Ridge v. Murchia, 258 Ill. 368; People v. Coal Belt, 311 Ill. 39.)

None of these contentions can be sustained, in view of the controlling fact that an action under the Workmen's Compensation act has been held to be a purely statutory proceeding and that exclusive provisions for the manner in which a judgment under that act may be reviewed are prescribed by statute. The legislature in the enactment of that statute had the power to provide how judgments and proceedings

It is stated that the court has jurisdiction under section 23 of the Practice Act, and that the court could correct an error in form without any petition as a matter of course. People v. ... 221 Ill. App. 134, and other cases are cited to that effect. It is also urged that the court has jurisdiction over the judgment and will stay the collection of a writ of judgment and order is rendered of record, on the authority of People v. ... 221 Ill. App. 134. People v. ... 221 Ill. App. 134, 38; that the court has power to vacate a judgment at any time after the expiration of the term, where the court was without jurisdiction to enter the judgment, and that such rule is applicable in summary proceedings. People v. ... 221 Ill. App. 134. People v. ... 221 Ill. App. 134, 38; that in cases where a writ of judgment is entered upon a limited or limited power or where a court has limited jurisdiction nothing is taken by judgment in favor of the jurisdiction. (People v. ... 221 Ill. App. 134, 38; People v. ... 221 Ill. App. 134, 38) Further that the writs may be issued as a matter of writ of certiorari under which the writs could be granted. General jurisdiction would have the power to review the writs. Jurisdiction in the summary proceedings (People v. ... 221 Ill. App. 134, 38) and finally that this court has jurisdiction to review the action at the circuit court in carrying the motion to vacate the judgment and in dismissing the petition (People v. ... 221 Ill. App. 134, 38). People v. ... 221 Ill. App. 134, 38. Some of these questions may be material, in view of the controlling fact that no action under the court's jurisdiction was ever held to be a summary proceeding and that summary provisions for the manner in which a judgment may be set aside are prescribed by statute. The legislature in the enactment

thereunder should be revised or, in its discretion, to provide that the same should not be reviewed at all. The cases of People v. McGaerty, 270 Ill. 610, and Wiernan v. Industrial Commission, 329 Ill. 625, construing subsection f, section 19 of the Workmen's Compensation act, are controlling and conclusive. The legislature has prescribed the only method by which a judgment entered under the Workmen's Compensation act may be reviewed.

The Circuit court being wholly without jurisdiction to entertain the petition by reason of the provisions of the statute, the trial court properly found that it was without jurisdiction and dismissed the same. The judgment will therefore be affirmed.

AFFIRMED.

McCurely, P. J., and O'Connor, J., concur.

[illegible]

The United States being under obligation to maintain the position of the United States in the world, it is the duty of the United States to maintain the position of the United States in the world.

UNCLASSIFIED//FOR OFFICIAL USE ONLY

35857

OSCAR NELSON and E. A. HOLMBERG,
Trading as Nelson & Holmberg,
Defendants in Error,

vs.

TRENNER J. JACOBSEN, Sued as
Ferner Jacobson, Trading as
Jacobson & Company,
Plaintiff in Error.

86
BRANCH TO MUNICIPAL COURT
OF CHICAGO.

267 I.A. 616²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Nelson and Holmberg sued Jacobsen in tort averring in the statement of claim that on December 21, 1928, and on January 5, 1929, they delivered goods and merchandise to him, on the one date of the value of \$51.35 and on the other of the value of \$11.90, the same to be paid for upon delivery; that in each case defendant delivered in payment therefor a check which was returned by the bank unpaid. It was also averred that defendant did these things for the purpose of cheating and defrauding plaintiffs to the amount of \$63.95. Defendant filed an affidavit of merits denying any intent to cheat or defraud plaintiffs, admitting the contracts for the sale of the goods, and setting up a discharge in bankruptcy claiming the benefit of it.

There was a trial by the court and a finding that defendant was guilty in manner and form as charged in plaintiffs' statement of claim, with damages of \$63.95 and judgment on the finding for that amount, motions for a new trial and in arrest of judgment having been overruled.

Defendant in his brief presents twenty-one points indicating (we guess) a doubt in his own mind as to whether any one of them is valid. It is first earnestly contended that the judgment should be reversed because there is a variance between the statement of claim and the summons. An examination of the record indicates that the praecipe and the statement in the case were

58007

OSCAR NELSON and L. A. JACOBSON,
Plaintiffs in Error,
vs.
THOMAS J. JACOBSON, Defendant.

vs.

THOMAS J. JACOBSON, Defendant,
vs.
OSCAR NELSON and L. A. JACOBSON,
Plaintiffs in Error.

BY CHARGE.

387 L.A. 616

MR. JUSTICE LAURENT DELIVERED THE OPINION OF THE COURT.

Oscar Nelson and Jacobson were Jacobson in fact asserting in the statement of claim filed on December 31, 1922, and on January 2, 1923, they delivered goods and merchandise to him, on the one date of the value of \$21.32 and on the other of the value of \$11.32. The same to be paid for upon delivery; that in each case defendant delivered in payment thereof a check which was returned by the bank unpaid. It was also averred that defendant did these things for the purpose of cheating and defrauding plaintiff to the amount of \$32.64. Defendant filed an affidavit of active bankruptcy and intent to cheat or defraud plaintiff, admitting the contracts for the sale of the goods, and asserting as a discharge in bankruptcy claiming the benefit of it. There was a trial by the court and a finding that defendant was guilty in manner and form as charged in plaintiff's statement of claim, with damages of \$32.64 and judgment on the finding for that amount, motions for a new trial and in arrest of judgment being overruled. Defendant in his brief presents twenty-one points insisting (we guess) a doubt in his own mind as to whether any one of them is valid. It is first earnestly contended that the judgment should be reversed because there is a variance between the statement of claim and the answers. An examination of the record

filed May 21, 1929; that the summons issued against "Trenner J. Jacobsen;" while the statement of claim describes defendant as "Ferner Jacobsen," an alias summons was issued returnable on May 25, 1931, and was returned served on Trenner J. Jacobsen on May 12, 1931. On May 20, 1931, the appearance of Trenner J. Jacobsen was filed by his attorney, and on the same date an affidavit of merits, executed as of May 18, 1931, was filed. It is described as the affidavit of "Trenner J. Jacobsen." Prior to the issuance of the alias summons, on May 5, 1931, an order was entered "that all records, papers and proceedings be amended by changing the name of the defendant to read Trenner J. Jacobsen." However, in the finding defendant is described as "Ferner Jacobsen." A capias issued on October 18, 1931, against Trenner J. Jacobsen and was duly served, as the return shows, by a delivery to Trenner Jacobsen. The appeal bond is executed in the name of Trenner J. Jacobsen.

Section 6, chapter 7, of the statute of Amendments and Joinders (Smith-Hurd's Ill. Rev. Stats. 1931, chap. 7, sec. 6, p. 130) provides:

"Judgment shall not be arrested or stayed after verdict, nor shall any judgment upon verdict or finding by the court, or upon confession ni dicat or non sum informatus, or upon any writ of inquiry of damages be reversed, impaired, or in any way affected, by reason of any of the following imperfections, omissions, defects, matters or things in the process, pleadings, proceedings or records, namely: ***

Tenth--for any mistake in the name of any party or person, or in any sum of money, or in the description of any property, or in reciting or stating any day, month or year when the correct name, time, month or description shall have been once rightly alleged in any of the pleadings or proceedings."

This statute, when considered in connection with Kerr v. Swallow, 33 Ill. 379, where a variance in the christian name of the defendant is held to be not material, makes impossible a reversal on this ground.

The evidence shows that checks given for the goods in question were post-dated, and it is strenuously contended that

this negatives any intention on the part of defendant to defraud plaintiffs. It was held in People v. Westerdahl, 316 Ill. 86, that the mere fact that a check was post-dated was not sufficient to prevent a conviction under paragraph 255 of the Criminal Code (Smith-Hurd's Ill. Rev. Stats., 1931, chap. 38, par. 255, p. 1027) for the offense of obtaining goods by means of a worthless check. One who purchases goods not intending at the time to pay for them is guilty of fraud, and the evidence in this record is sufficient, we think, to show such intention on the part of this defendant. Apparently, plaintiffs did not rely on defendant's personal credit but defendant drew and delivered the checks for the purpose of inducing plaintiffs to believe that the same would be paid on presentation and thus succeeded in securing the possession of the goods. The fact that both deliveries of merchandise were made on a C. O. D. or cash on delivery basis would indicate that plaintiffs relied not upon the personal credit of defendant but upon checks which he delivered.

Defendant also contends that the discharge in bankruptcy should have been held to be a defense to the action. The allegations and the proofs tend to show that this defendant, through the use of these checks by false representations, secured possession of these goods not intending to pay for them. The Bankruptcy act is intended to release honest debtors, not those who succeed in obtaining goods by false representations. Forsyth v. Vehmeyer, 176 Ill. 359; Guernsey-Newton Co. v. Napier, 275 Pac. 724, 14 A.B.R. (N.S.) 665.

The judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

35877

TYLER & HIPFACH,
a Corporation,
Appellee.

vs.

COOK LUMBER & TERMINAL CO.,
a Corporation,
Appellant.

877
APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

267 I.A. 616³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

December 19, 1931, plaintiff sued defendant in assumpsit for goods sold and delivered. Attached to the declaration was an affidavit of claim to the effect that there was due the sum of \$1949.73. Defendant was served and filed an appearance on January 5, 1932, a plea of non assumpsit on January 14, 1932, and on the same day an affidavit of merits unattached to the plea. January 16th thereafter the plea and the affidavit of merits were stricken from the files as being insufficient in law, the default of defendant was entered, and a judgment was rendered for the amount as stated in plaintiff's affidavit. This is the judgment which defendant seeks to reverse by this appeal.

It is urged that the affidavit of merits is sufficient as a matter of law; that the court erred in striking it and abused its discretion in refusing to permit defendant to file an amended affidavit of merits.

The declaration, which consisted in part of the common counts, contained a copy of the invoice showing deliveries of merchandise upon various dates from March 13th until November 17th, 1931, for the total price of \$4790.50, credits thereon by payments in cash on June 13th, August 8th and November 6th, amounting to \$2500 and credits by return of merchandise on October 26th, November 3rd and November 7th amounting to \$409.27, leaving a balance due of \$1891.23, which with interest thereon at five per cent from

December 23, 1931, amounted to the total sum claimed.

The defense as set up in the affidavit of merits alleged that the merchandise delivered consisted of quantities of a special type of glass known as "crystal sheet;" that plaintiff corporation had warranted that all of the glass would be white in color and would not be scratched so that it would be suitable for use in edge illumination wherein rays of light were refracted not through the plane surface of the sheet of glass but through the edge thereof; that the agents of plaintiff exhibited to defendant samples of this glass and warranted that the merchandise to be delivered would conform to the sample; that the glass was delivered at irregular intervals from March 13, 1931, to and including November 17, 1931; that the deliveries were in varying quantities and were made in large crates "and that it was impossible by inspection, at the time of the delivery of any shipment or shipments, of said merchandise, to ascertain whether it conformed to sample and to the warranties made;" that when the servants of defendant opened the crates "it became apparent that much of the said glass was off color, that it was not white, that therefore it did not correspond to the said samples in these respects, nor to the warranties therefore made by the plaintiff, and that the said glass was so scratched as to render it quite useless for edge illumination purposes."

The affidavit of merits states that on October 26, 1931, as soon as these defects became apparent, defendant ordered the return of a quantity of this merchandise, and that the same was returned and accepted by plaintiff corporation; that a similar defect became apparent on or about November 7th in another quantity of merchandise; that this also was returned and accepted by plaintiff; that thereafter on or about December 2, 1931, when defects in more of the glass became apparent, defendant informed plaintiff through its officers of that fact and tendered a

December 22, 1931, amounted to the total sum claimed.

The defense as set up in the affidavit of motive alleged

that the merchandise delivered consisted of quantities of a

special type of glass known as "crystal clear"; that quantity

correction had warranted that all of the glass would be white in

color and would not be scratched or that it would be suitable for

use in edge illumination wherein rays of light very reflected not

through the glass surface of the sheet of glass but through the

edges thereof; that the agents of plaintiff exhibited to defendant

samples of this glass and warranted that the merchandise to be de-

livered would contain as the sample; that the glass was delivered

at irregular intervals from March 15, 1931, to and including November

17, 1931; that the deliveries were in varying quantities and were

made in large crates and that it was impossible to inspect, at

the time of the delivery or any shipment or unshipment, of said mer-

chandise, to ascertain whether it was scratched or white and to the

entireties; that when the quantity of glass was received the

quantity of it was received and that when it was received it was

white, that it was not white, that defendant is in the act of paying

to the said vendor in these respects, and to the warranties there-

before made by the plaintiff, and that the said glass was so

retained as to render it quite useless for edge illumination purposes.

The affidavit of motive states that on October 22, 1931,

as soon as these defects became apparent, defendant ordered the

return of a quantity of this merchandise, and that the same was

returned and accepted by a similar representation; that a similar

defect became apparent on or about December 7th in another

quantity of merchandise; that this time also was returned and ac-

cepted by plaintiff; that thereafter on or about December 11, 1931,

when defects in some of the glass became apparent, defendant in-

return of the remaining merchandise.

The affidavit denies an account stated and avers that defendant corporation was organized under the laws of Illinois "for the sole purpose of dealing in lumber and lumber products;" that the charter of the defendant corporation did not give it the right to purchase, sell or otherwise deal in the glassware which was sold by the plaintiff corporation, and that therefore the agreement of purchase and sale of the merchandise was ultra vires the defendant corporation.

The Uniform Sales act (Smith-Hurd's Ill. Rev. Stats. 1931, chap. 121½) is applicable. Section 16 of that act provides:

"In case of a contract to sell or a sale by sample:
(a) There is an implied warranty that the bulk shall correspond with the sample in quality; *** (c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample."

Section 49 of the same statute provides:

"In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

Defendant contends that conceding that these goods were accepted by it, notice of the alleged breach of warranty as given to plaintiff by defendant was alleged to have been made within a reasonable time. The pleadings show that the deliveries began March 13, 1931, and ended November 17, 1931. A large part of the goods was accepted and substantial payments were made thereon without any notice to plaintiff of any claim that the goods were defective in any respect. The affidavit of merits does not set up or describe with any degree of certainty the particular delivery which it is claimed was defective. So far as the averments of this affidavit are concerned all the defective goods may have been returned to plaintiff and accepted by plaintiff. Defendant cites a number

of cases such as Conner v. Berland-Grannis Co., 294 Ill. 58, where a defendant claimed that an automobile purchased and to be paid for in installments turned out upon use to be defective, and it was held that a delay of four months in giving notice of the claimed defect was not as a matter of law unreasonable; Schram v. Cottenburg, 198 N. Y. S. 309, where there was a sale of an article known as "Crown corks" which were discovered to be defective by the customer one year later, and notice within that time was held to be sufficient; Gleason v. Lebolt, 312 N. Y. S. 227, where a diamond was sold December 31, 1920, and warranted to be perfect, and in June, 1922, for the first time was found to be defective and notice thereof given, and it was held to be in time; Laganas Shoe Mfg. Co. v. Sharrod, 217 N. W. 941, where a manufacturer shipped shoes from its factory to the vendee from March 13 until May 25, 1925, the vendee complained of defects on June 5th, June 27th and July 7th, and on July 17th rescinded the sale on account of these defects, and the notice was held to be in time, the nature of the defect being such that it would be discovered only after the shoes had been worn by the customers of the vendee. The general rule is, of course, that a vendee must give notice of claimed defects within a reasonable time and that ordinarily what is considered a reasonable time is a question for the jury. However, where the facts and circumstances are such that there could not reasonably be a difference of opinion as to whether the vendee had given notice within a reasonable time, then the question becomes one of law for the court. Section 48 of the Uniform Sales act (Smith-Hurd's Ill. Rev. Stats. 1931, chap. 121½) provides:

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

Section 49 provides:

of course when we Exhibit 1, Henry-Hamlin Co., 202 E. 22, where
a defendant is held that an automobile purchased and to be paid for
in installments turned out upon was to be defective, and it was
held that a delay of four months in giving notice of the claimed
defect was not as a matter of law unreasonable; Henry v. Quinn,
100 N. Y. 2, 200, where there was a sale of an article known
as "brown cork" which were discovered to be defective by the cus-
omer one year later, and notice within that time was held to be
sufficient; Henry v. Quinn, 100 N. Y. 2, 200, where a contract
was sold December 31, 1920, and warranted to be perfect, and in
June, 1921, for the first time was found to be defective and notice
thereof given, and it was held to be in time; Jackson v. Smith,
117 N. Y. 2, 201, where a contract was sold June 15, 1920, the
vendor complained of defects on June 25, June 27th and July 1st,
and on July 15th rescinded the sale on account of those defects,
and the notice was held to be in time, the nature of the defect
being such that it could be discovered only after the shoes had been
used by the contents of the vendor. The general rule is, of course,
that a vendor must give notice of claimed defects within a reason-
able time and that venditor must be considered a reasonable time
is a question for the jury, however, where the facts and circum-
stances are such that there would not reasonably be a doubt
of opinion as to whether the vendor had given notice within a
reasonable time, then the question becomes one of law for the court.
Section 48 of the Uniform Sales Act (Smith-Hamlin's 111. Rev. Stat.

1911, Chap. 121) provided:

"The buyer is deemed to have accepted the goods when he in-
clauses in the bill of lading that he has accepted them, or when the goods
have been delivered to him, and he does not give any notice of
claim within a reasonable time with the acceptance of the bill of lading,
when, after the lapse of a reasonable time, he retains the goods
without intimating to the seller that he has rejected them."

"In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

Here, the allegation of the affidavit is that glass was delivered in large crates and that it was impossible by inspection at the time of shipment to ascertain whether it conformed to sample and warranties, but this obviously is only the conclusion of the pleader. It appears from the affidavit quite definitely that there was no reason why the glass could not be promptly inspected at the time of its delivery. Under the facts as averred by this affidavit, it must be held as a matter of law that there was no timely attempt made to reject the glass. Liquid Carbonic Corp. v. Carombas, 230 N. Y. S. 537. The cases upon which defendant relies are all clearly distinguishable upon the facts, and without any lengthy discussion we hold that Illinois Glass Co. v. Ozel Co., 197 Ill. App. 626; Eureka Walat Co. v. Herrick Bros. & Co., 226 Ill. App. 316; Goodlatte v. Acme Sales Co., 230 Ill. App. 610; Panama Hat Works v. Paragon Hat Co., 245 Ill. App. 531, and McCaskey Register Co. v. Little, 253 Ill. App. 431, are cases where upon facts not materially different from those which appear here the court held as a matter of law that timely notice was not given.

Neither are the facts set up in the affidavit asserting the defense of ultra vires sufficient. If the purchase of glass was actually ultra vires the corporation, consistency on the part of defendant would have required of it an offer to return all the glass delivered. It has been held that the plea of ultra vires should not as a general rule prevail where interposed for or against a corporation when it would not advance justice but would accomplish a legal wrong. Kadish v. G. O. E. L. & B. Association, 151 Ill. 531. A corporation may exercise not only the powers expressly granted by

its charter but also such powers as are reasonably necessary to enable it to carry into effect the object for which it was created. Vanner v. Chicago City Ry. Co., 236 Ill. 360. A plea of ultra vires which would have the effect of allowing a defendant to receive and keep goods and merchandise for which it would not be required to pay would seem to have some of the ethical qualities of licensing piracy on the high seas. The averments of this affidavit are wholly insufficient to sustain the interposition of that defense.

It is also urged that the court erred in failing to allow defendant to file an amended affidavit. The proposed affidavit is not preserved in the record. It is true that amendments to pleadings should be liberally allowed for the furtherance of justice and that this court will not hesitate to reverse where discretion has been abused in this respect, but in the absence of any showing as to what the amended affidavit would contain and under circumstances such as appear here, we cannot hold that there was any abuse of discretion.

For the reasons indicated, the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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to receive and keep good and trustworthy for which is worth not
be required to pay would seem to have some of the various facilities
of licensing directly on the high seas. The agreement of this article
have are wholly inoperative to ensure the inspection of ships

[illegible]

It would you are ready find like reason or, great things as done
... ..

... ..

CONSTITUTION

Received 15 January 1998; accepted 15 April 1998

SOLOMON LEWIS,
Appellee,

vs.

MORRIS RICHTER and LOUIS A. SHERMAN,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 616

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on contract and upon trial by the court there was a finding for plaintiff in the sum of \$171.33 and judgment thereon which defendants seek to reverse.

The claim of plaintiff arises out of a transaction by which on April 29, 1929, defendant Richter conveyed to plaintiff Lewis a piece of real estate in Cook county, Illinois. Defendant Sherman is an attorney who represented Richter in closing this transaction and who acted as escrowee of a fund deposited by Richter for the benefit of plaintiff at that time.

The principal contention of defendants is that the finding and judgment is against the manifest weight of the evidence. It appears to have been the desire of the parties in making their final settlement that the taxes should be prorated, and the written agreement executed by them at that time recites that "the party of the first part (Richter)" has "credited the party of the second part (Lewis) with the sum of \$72 in and as for the general taxes levied or to be levied *** for the period beginning on January 1, 1928, and ending on April 30, 1929;" that "whereas, the general taxes levied or to be levied on the above described premises for the year 1928-9 cannot now be ascertained by or paid to the County Collector," the parties therefore agree "that when the annual taxes for the year 1928 upon the above described premises are levied and the amount of same ascertained from the proper local authorities of Cook County, Illinois, it shall be the duty of the above mentioned parties to

EXHIBIT 1111

EXHIBIT 1111

1111

MONROE HIGHTER and LEON A. HIGHTER, Appellants.

SEVERAL 816

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

In an action on contract and upon trial by the court there was a finding for plaintiff in the sum of \$111.88 and judgment thereon which defendant seeks to reverse.

The claim of plaintiff arises out of a transaction by which on April 23, 1932, defendant Highter conveyed to plaintiff Lewis a piece of real estate in Cook county, Illinois. Defendant Highter was an attorney who represented Highter in closing this transaction and who acted as escrowee of a fund deposited by Highter for the purpose of plaintiff at that time.

The principal contention of defendant is that the finding

and judgment is against the weight of the evidence. It

appears to have been the theory of the parties in making their first payment that the taxes would be credited, and the witness who

went executed by him at that time testified that "the party of the

first party (Highter)" had "credited the party of the second party

(Lewis) with the sum of \$75.00 as for the taxes for the year 1932-3

or he had paid for the period beginning on January 1, 1932,

and ending on April 23, 1932;" that "whereas, the general taxes for

or to be paid on the above described premises for the year 1932-3

amount now be ascertained by or paid to the County Collector," the

parties therefore agree "that when the annual taxes for the year

1932 upon the above described premises are levied and the amount

of same ascertained from the proper local authorities of Cook County,

adjust the difference in said taxes from the period of the 1st day of January, 1928, to the 30th day of April, 1929, and pay to each other on demand said difference;" that "the party of the first part hereby expressly and mutually agrees to pay on demand to said party of the second part whatever sum in taxes as figured will exceed the sum of \$72.00 now allowed to the party of the second part in and as for the taxes for the above mentioned period, and the party of the second part hereby expressly agrees to pay to the party of the first part whatever sum will be less than \$72.00 now allowed said party of the first part as figured." For the purpose of carrying out this agreement \$300 was deposited by plaintiff with defendant Sherman, and an agreement was made between Richter, Lewis and Sherman which recites the sale of the premises and that "in prorating the general taxes for the year 1928 and up to and including April 30, 1929, an allowance was made of \$72.00; and whereas, it is expected that general taxes for the said period will exceed said sum," it was agreed that the \$300 so deposited was "to be held by the party of the third part until such time as the general taxes for the year 1928 are ascertained, at which time the taxes for said period ending April 30, 1929, will be prorated on the basis of the 1928 tax bill; and in the event it should appear that the amount due the party of the second part exceeds the sum of Seventy-two dollars (\$72.00) for the said period of time, then, in that event, the said party of the third part is directed to apply such portion of said Three Hundred Dollars (\$300.00) left with him in deposit toward the payment of such taxes for the year 1928 and 1929 prorated to April 30, 1929." The agreement also provided that in the event that said sum was exhausted, Richter should pay Lewis on demand the amount found due, it being specifically agreed that Sherman should not be liable to either of the parties in any event, except as far as the \$300 was applied toward the taxes.

against the difference in said taxes from the period of the last day of January, 1939, to the first day of April, 1939, and pay to each other on demand said difference; that the party of the first part hereby expressly and mutually agrees to pay on demand to said party of the second part whatever sum is shown as figured will exceed the sum of \$78.00 now allowed to the party of the second part in and as for the taxes for the above mentioned period, and the party of the second part hereby expressly agrees to pay to the party of the first part whatever sum will be less than \$78.00 now allowed said party of the first part as figured. For the purpose of carrying out this agreement \$300 was deposited by plaintiff with defendant Sherman, and an agreement was made between Richter, Lewis and Sherman which recites the sale of the business and that in connection therewith taxes for the year 1938 and up to and including April 30, 1939, an allowance was made of \$78.00; and wherein, it is expressed that any over taken for the said period will exceed said sum, it was agreed that the \$300 so deposited was to be held by the party of the first part until such time as the general taxes for the year 1938 are ascertained, at which time the taxes for said period ending April 30, 1939, will be presented on the basis of the 1938 tax bill; and in the event it should appear that the amount due the party of the second part exceeds the amount deposited, the party of the first part, then, in that event, the said party of the third part is to agree to pay such portion of said three hundred dollars (\$300.00) left after the amount shown the payment of such taxes for the year 1938 and 1939 presented on April 30, 1939. The agreement also provided that in the event that said sum was exceeded, Richter should pay Lewis on demand the amount found due, it being expressly agreed that Sherman should not be liable to either of the parties in any event, except as for as the \$300 was

It appears from the evidence that for the year 1929 the property sold was assessed at the sum of \$514.42, and that the pro rata share of said taxes from January 1st to April 30th amounts to \$171.33; that plaintiff demanded payment of this amount, but that defendants refused to pay, contending that the contract when properly construed provided for prorating of the 1929 taxes on the basis of the 1928 tax bill. The attorney for plaintiff, Mr. Goode, testified that prior to the closing of the transaction he had ascertained the amount of the taxes for the year 1928; that he went with Sherman, or someone from his office, to the office of the Board of Assessors and checked the figures; that there was no bill obtainable at that time, but he received an estimate of the taxes for 1928 which covered only the lot sold and not the building thereon and which was approximately \$72. He also testified that he had a conversation with Sherman and told him that they could not collect for the 1928 taxes because there was an assessment on the land only, and that he wrote to Sherman telling him to hold the escrow until the 1929 bill would come out; that subsequently Sherman called him up and asked him whether he would have the man who had taken care of the taxes in 1928 again keep the building from showing on the tax bill for 1929. The attorney further testified that he told Sherman that plaintiff would not agree to that; that when the 1929 tax bill came out, he demanded the money and that Sherman said that he couldn't pay him because that money belonged to the tax fixer; that he (witness) told Sherman, "I am not interested in any tax fixer, I want that money for Lewis," and that Sherman said, "I will send the tax fixer over to your office;" that Sherman then told him that he could get the money only by filing suit.

Sherman testified that when Mr. Goode informed him that the tax bill was about \$500, he said, "Mr. Goode, you got the contract; the contract provides prorating on the basis of the 1928 tax bill."

It appears from the evidence that for the year 1935 the property sold was assessed at the sum of \$214.45, and that the net sale price of said taxes from January 1st to April 1st, 1936, was \$117.15; that plaintiff demanded payment of this amount, but that defendant refused to pay, contending that the contract when properly construed provided for payment of the 1935 taxes on the basis of the 1935 tax bill. The attorney for plaintiff, Mr. Goode, testified that prior to the closing of the transaction he had ascertained the amount of the taxes for the year 1935; that he went with Sherman, or someone from his office, to the office of the Board of Assessors and checked the figures; that there was no bill obtainable at that time, but he received an estimate of the taxes for 1936 which covered only the 1st half and not the building thereon and which was approximately \$75. He also testified that he had a conversation with Sherman and told him that they could not collect for the 1935 taxes because there was an agreement on the part of the Board of Assessors to collect only the 1st half of the taxes until the 1936 bill would come out; that subsequently Sherman called him up and asked him whether he would have the man who had been told at the time to look after the building then collect on the tax bill for 1935. The attorney further testified that he told Sherman that plaintiff would not agree to that; that when the 1936 tax bill came out, he demanded the money and that Sherman said that he couldn't pay him because the money belonged to the tax fixer; that he (attorney) told Sherman, "I am not interested in any fixer, I want that money for Lewis," and that Sherman then said, "I want that money for Lewis," and that Sherman then told him that he could get the money only by taking note.

Goode testified that when Mr. Goode informed him that the tax bill was about \$75, he said, "Mr. Goode, you got the wrong bill."

Sherman admitted that on that basis a little more than \$20 was due which he was ready to pay, and the amount was tendered in court and refused.

While there is some ambiguity in the language of the writings, the oral evidence which was admissible (Mahler Textiles, Inc. v. Woodke, 251 Ill. App. 177; Kreiling v. Northrup, 215 Ill. 195) leaves no doubt that it was the intention of the parties that the taxes as levied for the year 1929 should be prorated. The uncontradicted evidence to the effect that the amount of the taxes for 1929, as well as the amount of money put in escrow, was ascertained and allowed, and the acts of the parties after the execution of the contracts leave not the least doubt on that proposition. The two written contracts were executed at the same time and were a part of the same transaction. They must therefore be construed together (Kalapi v. Holcomb & Hake Mfg. Co., 241 Ill. App. 102), and oral evidence was admissible for the purpose of clearing up the ambiguity. The primary purpose of construing any contract is to ascertain the true intention of the parties at the time it was made, and evidence of the surrounding circumstances is admissible in order that this may be done. Whalen v. Stephens, 193 Ill. 121; Adams v. Gordon, 265 Ill. 87.

We have no doubt the trial court properly interpreted the contract and committed no reversible error in admitting evidence as to the circumstances under which the contracts were made and as to the conversations of the parties and their agents with reference to the same after execution.

It is urged that the court erred in finding the issues against both defendants and entering judgment against them. No authorities are cited to that proposition. The evidence is sufficient to show that both are liable, and there was no affidavit denying joint liability. The judgment is just and it is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

Shannon testified that on that date a little over three and one-half years ago, and the amount was deposited in bank and

retained.

While there is some ambiguity in the language of the willage,

the oral testimony which was admitted is sufficient to establish

Shannon v. Shannon, 102 Ill. App. 102, 103.

There is no doubt that it was the intention of the parties that the

taxes as levied for the year 1906 should be paid. The money

deposited in the bank was the money of the parties and

1906, as well as the amount of money put in reserve, was ascertained

and allowed, and the note of the parties after the execution of the

contract. There was no doubt on that subject. The two

written contracts were executed at the same time and were a part of

the same transaction. They were intended to be read together

(Shannon v. Shannon, 102 Ill. App. 102, 103.) and oral

testimony was admitted in the absence of evidence to the contrary.

The primary purpose of construing any contract is to ascertain the

true intention of the parties at the time it was made, and evidence

of the surrounding circumstances is admissible in order that this

may be done. Shannon v. Shannon, 102 Ill. App. 102, 103.

Ill. App. 102.

There is no doubt that the oral testimony properly introduced in

the case and admitted as relevant evidence in construing the

in the circumstances under which the contract was made and as to

the construction of the contract and that it is proper to

the oral testimony.

It is held that the oral testimony in construing the contract

is admissible and relevant evidence in construing the contract

and that it is proper to admit the oral testimony in construing the

contract.

HARRY E. SKINNER, doing business as
HARRY E. SKINNER CO.,

Appellee,

vs.

FRANK HUSAR, doing business as
ILLINOIS SURGICAL SUPPLY CO.,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 316

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action upon contract for goods sold and delivered at defendant's special instance and request on January 14, 1931, there was a finding for plaintiff in the sum of \$294.50, which defendant seeks to reverse on this appeal. The goods in question are described in the statement of claim as follows:

| | | | | |
|--------|--------|------------------------|-------|----------------|
| "1,150 | 1" | Bandages paper wrapped | @ .15 | |
| | | doz. | | \$14.40. |
| 950 | 1 1/2" | Bandages paper wrapped | @ .20 | |
| | | doz. | | 32.50 |
| 11,000 | 2" | Bandages paper wrapped | @ .20 | |
| | | doz. | | 247.50 |
| | | | | <hr/> \$294.50 |
| 1,000 | | Cartons | | 25.00 |
| | | | | <hr/> 25.00 |
| | | Total | | \$319.50." |

The defense interposed was stated to be that the bandages were not of the kind and quality ordered; that the order for the bandages was given to a salesman of plaintiff; that the bandages were to be of the length of ten yards and according to samples submitted by the salesman to defendant and were to be wrapped in paper, in good, clean, salable condition and packed one dozen packages to the box; that the bandages were delivered in two boxes, unpacked, and were of lengths ranging from three to ten yards and in quality were unlike the sample submitted at the time the order was given; that upon delivery and before complete inspection defendant notified plaintiff that the goods were not wrapped and could not be used by him; that plaintiff said that he would send cartons, of

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on enclosed which, NADUM HEATE
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In an earlier report submitted to your committee by Special Agent in Charge [redacted], dated [redacted], it was stated that [redacted] had been observed at the residence of [redacted] on [redacted].

[illegible]

which he had plenty; that the cartons were sent, and that upon their receipt defendant opened the boxes containing the bandages and discovered that the same did not conform to sample, in that they were not of ten yard lengths; that thereupon defendant notified plaintiff that he would not accept them and requested plaintiff to remove the goods, which he failed to do. The affidavit of merits avers that defendant was in the surgical supply business and that his merchandise was sold to hospitals, dispensaries, physicians and druggists, and that he informed plaintiff's salesman that he would be unable to use any merchandise unless it strictly conformed to the samples submitted.

Plaintiff has not appeared in this court to support the judgment entered. There is no doubt of the rules of law to be applied, which are set forth in the Uniform Sales act. Section 16 of that act (Smith-Hurd's Ill. Rev. Stats. 1931, chap. 121½, sec. 16, p. 2572) provides that in case of a contract to sell or a sale by sample, "(a) There is an implied warranty that the bulk shall correspond with the sample in quality. (b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in Section 47. (3). (c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample." Section 50 of the same act (Smith-Hurd's Ill. Rev. Stats., chap. 121½, sec. 50, p. 2577) provides:

"Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them."

Section 47 (Smith-Hurd's Ill. Rev. Stats., chap. 121½, sec. 47, p. 2577) provides:

"Where goods are delivered to the buyer, which he has not

previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

Section 48 (Smith-Hurd's Ill. Rev. Stats., chap. 121 $\frac{1}{2}$, sec. 48, p. 2577) provides:

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

Defendant cites cases which hold that in an action by a seller to enforce a contract for the sale of goods, the burden is upon plaintiff to show that the goods tendered complied with the contract: McCall Co. v. Jacobson, 139 Mich. 455; Central Wisconsin Sup. Co. v. Johnson Bros., 194 Iowa, 1126; Wolf v. Dietsch, 75 Ill. 205, and other cases which hold that when a sale is made by sample and the goods represented to be like the sample but when delivered do not conform thereto, the vendee may rescind the same. Webster v. Granger, 78 Ill. 230; Decker v. Braverman, 196 Ill. 387; Architectural Tile Co. v. Spiro, 207 Ill. App. 167. Other cases cited hold that the goods must not only conform to the sample but must also comply with the representations made at the time of the sale. Wabash Canning Co. v. Nichols, 187 Ill. App. 176; Oxonized Ox Marrow Co. v. Barrett & Co., 211 Ill. App. 421.

Defendant also cites cases to the well established rule that it is the duty of this court to weigh the evidence and when the judgment is manifestly against the weight of it to reverse the judgment. Bidem v. Chicago, R. I. & P. Ry. Co., 144 Ill. App. 320; Crowder v. Chicago & A. R. R. Co., 145 Ill. App. 556; Loettcher v. Chicago C. Ry. Co., 150 Ill. App. 69.

The controlling question in the case, as we view the record, is whether the judgment entered is manifestly against the weight of the evidence. There is a sharp conflict in the evidence.

...examined, he is not bound to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

Section 48 (Sale of Goods Act, 1930, India), which reads as follows:

48. (1) Where the goods are sold in a bulk, the buyer may reject the whole or any part of the goods if they do not conform to the contract.

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does not give notice to the seller of the defect within the time specified in the contract, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

Section 49 (Sale of Goods Act, 1930, India), which reads as follows:

49. (1) Where the goods are sold in a bulk, the buyer may reject the whole or any part of the goods, and the seller is bound to deliver to him such part of the goods as he may require.

the contract: Section 48, Sale of Goods Act, 1930, India

Section 49, Sale of Goods Act, 1930, India

Section 50, Sale of Goods Act, 1930, India

Section 51, Sale of Goods Act, 1930, India

Section 52, Sale of Goods Act, 1930, India

Section 53, Sale of Goods Act, 1930, India

Section 54, Sale of Goods Act, 1930, India

Section 55, Sale of Goods Act, 1930, India

Section 56, Sale of Goods Act, 1930, India

Section 57, Sale of Goods Act, 1930, India

Section 58, Sale of Goods Act, 1930, India

Section 59, Sale of Goods Act, 1930, India

Section 60, Sale of Goods Act, 1930, India

Section 61, Sale of Goods Act, 1930, India

Section 62, Sale of Goods Act, 1930, India

Section 63, Sale of Goods Act, 1930, India

Section 64, Sale of Goods Act, 1930, India

Section 65, Sale of Goods Act, 1930, India

Plaintiff was a wholesale dealer of general merchandise; defendant a manufacturer and dealer in surgical supplies. On January 8, 1931, a salesman for plaintiff obtained from defendant the following written order:

"Kindly enter our order for the special lot of Gauze Bandages in whatever quantity you may have in stock at the following prices:

15¢ per dozen for the 1 inch bandages;
20¢ per dozen for the 1½ inch bandages; and
27¢ per dozen for the 2 inch bandages.

It is understood that all these bandages come wrapped in paper as per sample shown and in good clean, salable condition.

Payment will be made upon receipt of goods at the prices as specified above."

Shortly after this order was received the goods were delivered in two boxes but were not paid for at the time of delivery. Thus far there is no conflict in the evidence.

Plaintiff testified that he had several conversations with defendant after the delivery of this merchandise; that the first conversation was about two weeks after the delivery; that he called on defendant and asked him why the money was not paid, and that defendant replied, "Well, we have not had time to check it up yet;" that he (plaintiff) asked how long it would take defendant to check it, and that defendant said, "Well, we have been rather busy and we will try to get at it the next day." Plaintiff says that he called a second time and asked defendant if he had had time to check it and that defendant said, "No, no, you can come back tomorrow;" that he went back the next morning at which time defendant said, "Well, everything apparently is O. K. except that there ought to be some boxes;" that defendant asked if plaintiff had any boxes in which the bandages could be packed; that he (plaintiff) in substance replied that he had not agreed to furnish any boxes but if that was all that was needed to settle the thing and defendant would get him the money he would buy the boxes; that defendant replied, "That will be perfectly all right to go out and get the boxes and

come back here with them, and I will give you your check." Plaintiff says that he then bought the boxes at a cost of \$25 and delivered them; that defendant then told him to come back the next day and he would have a check for him; that when he (plaintiff) went back the following day, defendant insisted that he would have to have an allowance for labor in packing the boxes and that if plaintiff would not make a liberal allowance he would not take the goods. Plaintiff says that he refused to make the allowance; that the goods were delivered according to sample; that there was no reason for making the allowance; that he told defendant, "All I want is my money you agreed to pay, and I allowed an additional amount by paying \$25 for these boxes, we didn't agree to pay, but only to keep you satisfied;" that defendant replied, "Well, if you feel that way about it you take your goods to hell out of here, we don't want to bother with them." On cross-examination plaintiff said that the samples used by his salesman were taken from his own desk, and he identified defendant's exhibits 1, 2 and 3 as being such samples. He says that he didn't have the slightest idea what length the bandages were; that they were delivered packed in two wooden cases; that two girls went over them carefully before they were sent out; that defendant may have told him that it was customary in the trade to ship all these bandages twelve to a box. He expressly denied that defendant told him he did not want the merchandise, and that he should take it back because it did not conform with the samples, but he added, "I am not positive about it," and he was unable to recall from who he purchased the cartons which were delivered. He says that he submitted a sample carton to defendant which defendant approved, and that he has not the slightest recollection where he bought it.

Defendant says that he does not know the name of the salesman to whom he gave the order, but that the salesman brought a number of

come back here with them, and I will give you your share." "I think
 with says that he then bought the boxes at a cost of \$100 and de-
 livered them; that defendant then told him to come back the next
 day and he would have a check for him; that when he (plaintiff)
 went back the following day, defendant insisted that he would have
 to have an allowance for labor in packing the boxes and that if
 plaintiff would not make a liberal allowance he would not take the
 goods. Plaintiff says that he refused to make the allowance; that
 the goods were delivered according to sample; that there was no
 reason for making the allowance; that he told defendant, "All I
 want is my money you agreed to pay, and I allowed an additional
 amount by paying \$25 for horse boxes, as this is agreed to pay, but
 only to keep you satisfied;" that defendant replied, "Well, if you
 feel that way about it you take your goods to hell out of here, we
 don't want to return with them." On cross-examination plaintiff
 said that the samples were of the same quality as the goods
 sent, and he identified defendant's exhibits 1, 2 and 3 as being
 such samples. He says that he didn't have the slightest idea what
 length the packages were; that they were delivered packed in two
 wooden cases; that two girls went over them carefully before they
 were sent out; that defendant may have told him that it was un-
 known in the trade to ship all these packages packed in a box.
 He expressly stated that defendant told him at this time that the
 packages, and that he should have in some manner to ship them
 without the two samples, and he stated, "I am not positive about
 it," and he was unable to recall upon what he purchased the samples
 which were delivered. He says that he satisfied a woman named in
 defendant which defendant approved, and that he has not the slightest
 possession where he bought it.

Defendant says that he does not know the name of the person

samples and that defendant's exhibits 1, 2 and 3 are each one of these samples; that the samples contained about a dozen bandages which were all uniform and ten yards in length; that in the presence of the salesman they were unrolled and he (defendant) wrote on each of the Bandages the quantity he expected to get. Defendant's exhibit 7 is another sample which is ten yards in length. Defendant says that he measured some of the goods after they were delivered to him; that they were anywhere from three or four yards long up to every length imaginable; that they were all dumped in the boxes in varying lengths; that he first inspected the goods the day they were delivered, and that through a crack in the boxes he saw the bandages were dumped loose; that he called the Skinner company and complained of the manner and condition in which the goods were delivered, and that plaintiff came to the office before the boxes had been opened and said that he had a carload of empty cartons in his place and that defendant could have all of them he wanted; that plaintiff brought them in himself; that the next morning the boxes were opened but it was impossible to assort the bandages because there were so many varieties; that he (defendant) looked at the bandages and ordered the boxes nailed up and said that he did not buy merchandise like that and could not use it. Defendant further says that plaintiff came over and asked him what was the trouble and he told plaintiff that he would not dare to send goods like that out of his place of business even though plaintiff gave it to him free, and asked plaintiff to take the merchandise back; that he told plaintiff that the bandages were not only not like the sample in length but also of a quality entirely different from the sample; that it was not good grade but inferior goods, which he would never sell because it would ruin his reputation; that plaintiff never called for the goods but that he offered price concessions, first \$50 and then \$100.

examined and that defendant's exhibits 1, 2 and 3 were seen and of those samples; that the samples contained about a dozen packages which were all uniform and ten years in length; that in the presence of the salesman they were unrolled and he (defendant) wrote on each of the packages the quantity he expected to get. Defendant's exhibit 7 is another sample which is ten years in length. Defendant says that he happened down to the goods after they were delivered to him; that they were anywhere from three or four years - one up to twenty years - unrolled; that they were all changed in the boxes in varying lengths; that he first suspected the goods the day they were delivered, and that between a week in the boxes he saw the packages were damaged; that he called the Chicago company and complained to the manager and assistant in which the goods were delivered, and that plaintiff came to the office before the boxes had been opened and said that he had a stack of empty cartons in his place and that defendant could have all of them he wanted; that plaintiff brought them in himself; that the next morning the boxes were opened but it was impossible to count the packages because there were so many variations; that he (defendant) looked at the packages and opened the boxes and rolled up and said that he did not buy merchandise like that and would not sell it. Defendant further says that plaintiff came over and asked him what was the trouble and he told plaintiff that he would not like to send goods like that out of his place of business even though plaintiff gave it to him first, and asked plaintiff to take the merchandise back; that at that time plaintiff told the manager that not only not like the sample in length but also of a quality and strictly different from the sample; that it was not good grade but inferior goods, which he would never sell because it would ruin his reputation and plaintiff never called the goods but took

February 4, 1931, defendant sent a registered letter by mail to plaintiff, stating that the goods were not as represented or according to sample and asking that they be removed.

George H. Wright, who conducts a business of dealing in cotton gauze bandages and plasters, testified that in sales of bandages where the length was not mentioned, it was understood that the goods sold should be ten yards in length and have a mesh with a count of forty forty-four; that is, forty threads per inch one way and forty-four the other, and that was known as the standard bandage ever since he had been in the business. He testified that the samples exhibited were standard bandages.

Harvey Fox, a salesman for Parke-Davis company, testified to the effect that a bandage taken from defendant's exhibit 4 (which was a specimen of the goods delivered to defendant) was of a thirty-two twenty-eight mesh, and that the standard bandage was of a forty forty-four mesh and was thirty inches wide; that defendant's exhibits 1, 2 and 7, which were specimens of samples, were of a forty forty-four mesh, and that defendant's exhibit 3, another specimen of a sample, was a two inch bandage.

Tony Kerschbaum, an employee of defendant, corroborated the testimony of defendant as to the conversation about sending empty boxes to defendant's place of business. The condition and kind of goods as delivered was corroborated by another employee named Chapin.

The evidence of the salesman who represented plaintiff in this transaction was not taken, and we regret the necessity of deciding the case without his testimony. The absence of this material and important testimony, the faulty memory of plaintiff (who was not able to remember where he purchased the cartons furnished) the number of witnesses and exhibits in evidence which tend to corroborate the testimony of defendant, seem to compel the finding by this court that the judgment entered is against the manifest

February 4, 1937, defendant sent a registered letter by
mail to plaintiff, stating that the goods were not as represented
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the goods sold should be ten yards in length and have a mesh with
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way and forty-four the other, and that was known as the standard
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Harvey Fox, a salesman for Davis-Brown Company, testified
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was a specimen of the goods delivered to defendant) was of a forty-
two twenty-eight mesh, and that the standard bandage was of a
forty-forty-four mesh and was forty inches wide; that defendant's
exhibits 1, 5 and 7, which were specimens of samples, were of a
forty-forty-four mesh, and that defendant's exhibit 3, another
specimen of a sample, was a two inch bandage.
Tony Burschman, an employee of defendant, corroborated the
testimony of defendant as to the conversation about sending empty
boxes to defendant's place of business. The position and kind of
goods as delivered was corroborated by another employee named Martin.
The testimony of the salesman who represented plaintiff in
this transaction was not taken, and we reject the necessity of de-
clining the same without his testimony. The manner of this
testimony and important testimony, the fairly memory of plaintiff (who
was not able to remember words he uttered but stated indicated)
the number of witnesses and exhibits in evidence which tend to cor-

weight of the evidence.

The judgment is therefore reversed with such finding and judgment entered in this court in favor of defendant and against plaintiff for costs.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE.

McSurely, P. J., and O'Connor, J., concur.

WILLIAM OF THE WILSON.

The following is a list of the names of the persons who have been named in the report of the committee on the subject of the proposed amendment to the constitution of the State of New York.

ALBANY, N. Y., 1891.

WILLIAM OF THE WILSON.

ALBANY, N. Y., 1891.

We find as facts that the goods and merchandise delivered, for the price of which plaintiff sues, was sold to defendant by sample, and that the goods delivered did not conform to the samples by which the sale was made; that defendant, within a reasonable time and upon examination, rightfully refused to accept the same; and the judgment should be entered in this court in favor of defendant, Frank Musar, doing business as the Illinois Supply Co., and against plaintiff, Harry E. Skinner, doing business as the Harry E. Skinner Co., for costs.

35923

CARL A. LEAF,
Plaintiff in Error,

vs.

RICHARD GUTHMAN,
Defendant in Error.

907
ERROR TO MUNICIPAL COURT
OF CHICAGO.

267 I.A. 617¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On September 25, 1930, plaintiff caused a confession of judgment to be entered against defendant for \$230 under the terms of a written lease which was under seal. Defendant afterward made a motion that the judgment should be vacated and set aside, supporting the same by a verified petition, and November 7, 1930, an amended petition, also verified, was filed in support of the motion. The judgment was thereupon opened up, the order providing that it should stand as security and the petition as an affidavit of merits. The cause was tried by the court, and there was a finding for defendant with judgment thereon which plaintiff seeks to reverse.

The evidence shows that on August 17, 1928, plaintiff and defendant entered into a lease in writing and under seal, by which plaintiff devised to defendant flat No. 2 at 6503 North Claremont avenue, to be occupied as a dwelling for a term beginning October 1, 1928, and ending April 30, 1930. The habendum clause adds:

"Provided sixty days' written notice is given lessor by lessee of lessee's intention to terminate this lease on said last mentioned date, otherwise this lease, including all covenants and conditions therein, shall continue from year to year until terminated by like notice in some ensuing year. Lessor is entitled to terminate this lease upon like notice to lessee at like dates, by mailing said notice to the within mentioned premises, addressed to said lessee."

The rent reserved was \$70 a month, payable in advance on the date of the commencement of the lease and on the first day of each and every succeeding month.

Defendant went into possession of the premises with his family, and the uncontradicted evidence shows that either he or

one of his daughters remained in possession of same until April 30, 1930, on which date he vacated the premises and all rent which had accrued up to that time was paid. Defendant did not, however, give to plaintiff sixty days notice in writing of his intention to terminate said lease on April 30, 1930, and plaintiff claims that the lease was continued, and that by reason thereof the sum of \$210 for rent for May, June and July, 1930, became due and payable.

Defendant testified that in October, 1929, his wife underwent an operation; that he talked with plaintiff, Leaf, who lived in the same building, and told him about the condition of his wife and that he wished plaintiff would find a tenant so that he (defendant) could sublease the apartment, and that he also told plaintiff he would have to take his wife to the sanitarium in Milwaukee and did not know how long she would be there, and in the meantime he would like to take the furniture and put it away; that plaintiff said, "Yes, you try to rent it, and I will agree--as long as it will suit me, I will let you off on the lease;" that some time in December, 1929, just before he paid the January rent to plaintiff, plaintiff told him that he had several parties to take the apartment but that he did not have any key and asked defendant whether he would not give him the key to the apartment, and said that everything would be all right; whereupon the wife of defendant gave the key to plaintiff, who thereafter retained it. Defendant's wife died January 15th thereafter. He says that again he told plaintiff of his desire that plaintiff might make an effort to get somebody to take the apartment; that he (defendant) said that he would sell all the furniture, and that at that time plaintiff asked him what he wanted for different pieces of furniture such as he could use; that he told plaintiff that he wanted to sell it all, as he was going to give up housekeeping; that plaintiff then allowed him to put on the front door a sign which he (defendant) wrote

one of his daughters married to a man named [redacted] 30, 1930, on which date he vacated the premises and all rent which had accrued up to that time was paid. Defendant did not, however, give to plaintiff sixty days notice in writing of his intention to terminate said lease on April 30, 1930, and plaintiff claims that the lease was continued, and last by reason thereof the sum of \$210 for rent for May, June and July, 1930, became due and payable. Defendant testified that in October, 1929, his wife under- went an operation; that he visited his wife, and that in the same building, and told him about the condition of his wife and that he wished plaintiff would find a tenant so that he (defendant) could sublease the apartment, and that he also told plaintiff he would have to take his wife to the sanitarium in Milwaukee and did not know how long she would be there, and in the meantime he would like to take the furniture and put it away; that plaintiff said, "Yes, you try to rent it, and I will agree--as long as it will suit me, I will let you off on the house"; that some time in December, 1929, just before he paid the January rent to plaintiff, plaintiff told him that he had several parties to take the apartment but that he did not have any key and asked defendant whether he would not give him the key to the apartment, and said that everything would be all right; whereupon the wife of defendant gave the key to plaintiff, and thereafter retained it. Defendant's wife died during this apartment. He says that again he told plaintiff of his desire that plaintiff might make an effort to get somebody to take the apartment; that he (defendant) said that he would sell all the furniture, and that at that time plaintiff asked him what he wanted for different pieces of furniture such as his couch, etc.; that he told plaintiff that he wanted to sell it all, as he was going to give up housekeeping; that plaintiff then allowed

himself, indicating that the flat was for rent. Defendant also says that plaintiff afterward told him that a relative of his who lived next door was going to take the apartment, and asked defendant with his daughter to take another apartment, but that defendant said he did not want to do that; that after the death of his wife plaintiff had the key and continually brought people there to the place; that about February 1st defendant spoke to plaintiff and told him that his oldest daughter would stay in the apartment until the end of the lease; that as he could not sell his furniture or get a sublease he was going to have the oldest daughter stay there until the lease was up and that he would be responsible for the rent until that time; that plaintiff replied that was all right and that he was satisfied. Defendant admits that he never gave plaintiff any written notice that he was going to surrender possession on April 30, 1930, and he says that he did not know it was necessary or that it was in the lease; that he had signed the lease but had never read it.

Plaintiff says that defendant did not say to him in the presence of ^{his} wife in October, 1929, that he wanted to find a tenant to take the apartment; that he first talked with defendant after March 1st when he paid the March rent; that defendant then told him he was going to move and that he would allow plaintiff to show the apartment; that there was nothing said about the daughter taking the place; that defendant paid the March rent and his daughter paid the April rent. He says that defendant gave him the key to the apartment at the time the March rent was paid, but denies that defendant's wife had given him a key prior to that time, and declares there was nothing said about the apartment at the time of her death. Plaintiff denies that anything was said about putting up a "For Rent" sign. He says he never told defendant at any time that he had anyone in the building who was going to take the apartment. He

himself, indicating that the list was for rent. Defendant also says that plaintiff afterwards told him that a relative of his who lived next door was going to take the apartment, and asked defendant not to let his daughter go take another apartment, but that defendant said he did not want to do that; that after the death of his wife plaintiff had the key and continually brought people there to the place; that about February 1st defendant spoke to plaintiff and told him that his oldest daughter would stay in the apartment until the end of the lease; that as he could not sell his furniture or get a substitute he was going to have the oldest daughter stay there until the lease was up and that he would be responsible for the rent until that time; that plaintiff replied that was all right and that he was satisfied. Defendant admits that he never gave plaintiff any written notice that he was going to surrender possession on April 30, 1935, and he says that he did not know it was necessary or that it was in the lease; that he had signed the lease but

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denies that defendant said anything about moving or that he said anything to defendant about it being all right for him to vacate on April 30, 1930. He says that the apartment was vacant from May until September 1st, when a party moved into it. On cross examination plaintiff admitted that he knew defendant had vacated the apartment between the 1st and 8th of March and that after April 30th until this suit was brought he did not ask defendant for any rent, although in July and again in August he called defendant up to complain about some alleged damage to the electric light fixtures.

Plaintiff here relies on Williams v. Veeder, 195 Ill. App. 413, an abstracted decision which in substance held that a lease demising premises for a term of one year, which also provided that if the lessee should fail to notify the lessor sixty days before the end of the term of his intention to vacate at the end thereof, should, at the option of the lessor, operate to extend the term for a further period of one year, such provision being a present demise in case such notice was not given; that on the exercise of the option by the lessor, the legal effect thereof was the same as though the lease in express words had embraced a term of two years, and that such term in a lease was not merely a covenant specifically enforceable in equity or on which an action of law was maintainable.

That is a case in which the defendant failed to file any brief, and apparently no authorities were called to the attention of the court - at least no authorities are cited in the opinion. The holding is followed in the later case of Morris v. Taylor, 199 Ill. App. 588, where Williams v. Veeder is cited without other authority.

Plaintiff relies also on Pangborn v. Blakely, 217 Ill. App. 67, and Bell v. Groom, 224 Ill. App. 58, although in both these cases the question discussed is the nature of a tenancy created by

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anything to defendant about it being all right for him to vacate
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30th until this suit was brought he did not ask defendant for any
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to complain about some alleged damage to the electric light

Plaintiff here relies on Williams v. Taylor, 120 Cal. 420.
All, an abstracted decision in which it is stated that a lease
containing provisions for a term of one year, which also provided that
if the lessee should fail to verify the lease by a certain date
the end of the term of his intention to vacate at the end thereof,
should, at the option of the lessor, exercise to extend the term
for a further period of one year, such provision being a present
lease in case such notice was not given; that on the expiration of
the option by the lessee, the legal effect thereof was the same as
though the lease in express words had embraced a term of two years,
and that such term in a lease was not merely a covenant essentially
entirely in equity or on which an action of law was maintainable.

That is a case in which the defendant failed to file any
brief, and apparently no authorities were called to the attention
of the court - at least no authorities are cited in the opinion.
The holding is followed in the later case of North v. Taylor, 129
Cal. 400, 200 P. 2d 1000, in which it was held without error
authorities.

Plaintiff here also relies on Williams v. Taylor, 120 Cal. 420.
97, and North v. Taylor, 129 Cal. 400, 200 P. 2d 1000, in both cases

a tenant holding over with the assent of his landlord without regard to any such provision in the lease as existed in this case.

Assuming, however, that the clause in question is valid and has the effect of creating a present demise, there remains for consideration the question of whether on this record the court might properly find that there was a parol surrender and acceptance of the lease in question. Plaintiff cites Alsculer v. Schiff, 164 Ill. 298, to the proposition that an executory contract under seal cannot be modified, varied, discharged or released by an executory verbal agreement. The same case, however, holds that such a contract can be released and cancelled by an executed verbal agreement, citing Williams v. Vanderbilt, 145 Ill. 238.

The evidence given by defendant, which to us seems to be a more probable narration of what actually occurred, was sufficient, we hold, to show such an executed agreement. Defendant says that he told plaintiff that he would hold the premises until the end of the lease, evidently meaning April 30th; that he delivered the key of the premises to plaintiff in order that plaintiff might be able to re-rent the same, and that plaintiff said that this was all right. This agreement was followed by defendant's removal of his family and his furniture from the premises, not only without any protest from plaintiff so far as the evidence shows, but also without any demand by plaintiff, as he admits, for further rent which had theretofore been promptly paid. The verbal agreement having been executed, it follows that defendant was released from the obligations of his covenant under the written lease.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

attained.
For the reasons indicated the judgment of the trial court is
reversed under the written lease.
It follows that defendant was released from the obligations of his
lease expressly said. The verbal agreement being void, it
by plaintiff, as he said, for plaintiff took action and defendant
plaintiff as far as the evidence shows, but also witness my friend
his testimony from the premises, not only with us my present from
This agreement was followed by defendant's removal of his family and
verant the same, and that plaintiff said that this was all right.
The promise to plaintiff in order that plaintiff might be able to
lease, evidently meaning April 1931; that he delivered the key of
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we held, to show such an executed agreement. Defendant says that he
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Ill. 538, to the proposition that an executory contract under seal
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might properly find that there was a verbal agreement and acceptance
for consideration the question of whether on this record the court
and has the effect of creating a present lease, there remains
Assuming, however, that the lease in question is valid
a tenant holding over with the consent of his landlord without re-
gards to any such provision in the lease as existed in this case.

SENG TERMINAL WAREHOUSE COMPANY,
INC., a Corporation,
Appellee.

Y 3.

BRIAR PRODUCTS COMPANY, INC.,
a Corporation.

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 LA. 617²

This is an appeal by defendant, Briar Products Co., Inc., from a judgment in the sum of \$1500 entered upon the finding of the court.

The affidavit of merits denies joint liability and alleges that the written lease was not the act or deed of defendant, Briar Products Co., and that defendant never authorized the execution of the lease and never ratified or confirmed it.

It is also urged that the judgment should be reversed

NEW YORK NATIONAL BANK
INC., a corporation
New York

vs.

NEW YORK NATIONAL BANK
INC., a corporation
New York

Defendant

1. The plaintiff claims that the defendant is liable to it for the sum of \$1000.

This is an appeal by defendant, from a judgment of the court.

The judgment in the case at issue was entered upon the filing of

the court.

The amended statement of claim discloses a cause of action

against defendant and L. W. Kessler, with damages claimed to the

amount of \$1000. The facts alleged to be the basis of the

action are that defendant and Kessler, in 1911, and January, 1912,

and on March, 1911. The statement of claim was verified by John

Smith, his affidavit asserting that there was due to plaintiff from

defendant the sum of \$1000, and that Kessler, defendant and son.

That the sum of \$1000.

The affidavit of plaintiff's claim is verified by John

Smith, his affidavit asserting that there was due to plaintiff from

defendant the sum of \$1000, and that Kessler, defendant and son.

The issues and were raised or confirmed is.

It is urged that the judgment should be reversed because it

is the law of New York, and the plaintiff's interest was not

adversely affected. The court, however, was not upon the merits and

judgment entered upon the filing of the writ, and by reason of

the affidavit of plaintiff, the issues and entered in evidence and

adversely affected the plaintiff was not allowed because interest was

adversely.

because there was no proof of joint liability as alleged. The record, however, shows that at the beginning of the trial plaintiff dismissed as to Beasley, the other defendant, and for that reason it was unnecessary to prove the joint liability.

The controlling question in the case is raised by the contention of defendant that the lease upon which the suit was based was not signed by any person duly authorized to execute it on behalf of the defendant company.

The lease is dated August 4, 1930, and appears to have been executed as follows:

| | |
|-------------------------------|---------|
| "Briar Products Co., Inc. | (Seal) |
| L. W. Beasley, <u>Treas.</u> | (Seal) |
| Seng Terminal Whse. Co., Inc. | (Seal) |
| John F. Seng, <u>Pres.</u> | (Seal)" |

It affirmatively appears from the evidence that the defendant corporation never took possession of the premises or any part of them. The evidence further shows that at the time of the execution of this writing, Delmar Demaree was the general manager of the corporation, and that his authority was defined by Article VII of the By-Laws, which provides:

"The General Manager shall have the general supervision and control of all the agents and employees of the Company and the management of its business interests. He shall make all contracts for the Company and shall purchase all supplies, machinery, etc., required by the Company's business."

At that time Edward M. Sherburne was the secretary and attorney for the defendant company. He testified and produced its books and records. It appears that the purpose for which the corporation was organized was "to manufacture, buy, sell and deal in and with cosmetics, hair, chemical and pharmaceutical preparations." Article VI of the By-Laws defines the duties of the treasurer as follows:

"The Treasurer shall have the care and custody of all the funds and securities of the company, and deposit the same in the name of the corporation in such Bank or Banks, Trust Company or Trust Companies as the Board of Directors may direct. He shall

because there was no proof of joint liability as alleged. The record, however, shows that at the beginning of the trial liability was dismissed as to Hensley, the other defendant, and for that reason it was unnecessary to prove the joint liability. The controlling question in the case is raised by the contention of defendant that the lease upon which suit was based was not signed by any person duly authorized to execute it on behalf of the defendant company. The lease is dated August 4, 1933, and appears to have been executed as follows:

"Walter Production Co., Inc.
(Seal) L. W. Hensley, Vice-President
(Seal)
Sunny Petroleum Whose, Co., Inc.
(Seal) John A. Hensley, Vice-President
(Seal)"

It affirmatively appears from the evidence that the defendant corporation never took possession of the premises or any part of them. The evidence further shows that at the time of the execution of this writing, Delmar Hensley was the general manager of the corporation, and that the authority was defined by Article VII of the By-Laws, which provided:

"The General Manager shall have the general supervision and control of all the assets and employees of the Company and the management of the business interests. He shall make all contracts for the Company and shall purchase all supplies, machinery, etc., required by the Company's business."

As that law should be interpreted was the responsibility and authority for the defendant company. He testified and produced the books and records. It appears that the purpose for which the corporation was organized was "to manufacture, buy, sell and deal in and with gas, oil, coal, iron, steel and other mineral products." Article VI of the By-Laws defined the duties of the treasurer as follows:

"The Treasurer shall have the duty and custody of all the funds and securities of the company, and receipt for same in the name of the corporation in such bank or banks, Trust Company or

sign all checks, drafts, notes, and orders for the payment of money. He shall at all reasonable times exhibit his books and accounts to any director of the Company upon application at the office of the Company during business hours."

Article IX of the By-Laws provides:

"The seal of the corporation shall consist of a metal disc having engraved thereon the words Briar Products Co. Corporate Seal, Illinois."

At a meeting of the corporation held on April 10, 1938, a resolution was adopted directing the secretary to at once "procure for the corporation, a corporate seal, to be made in conformity with the By-laws of the corporation; and that such seal shall be, and the same is hereby adopted as and for the corporate seal of the corporation." Such seal was purchased immediately after the meeting and thereafter was in use by the company and was in the custody of its secretary. Mr. Beasley, the treasurer, whose name is signed in the lease, was not authorized at any meeting to sign contracts on behalf of the company, and no meeting of the board of directors was ever called after the execution of the lease to vote upon the question of its acceptance.

Whatever the presumption in the first instance might be, this uncontradicted evidence negatives the theory that the treasurer of this corporation was authorized to execute this lease. There is no prior course of dealing from which such authority could be implied, nor are there any facts tending to show that defendant is estopped to deny his authority. The powers of a private corporation are primarily lodged in its board of directors, and from that source either expressly or by implication the authority of its officers to act for the corporation must be derived. City of Chicago v. Stein, 252 Ill. 409. Under the uncontradicted proof we hold the treasurer did not have the power to execute this lease. Klein v. Louis Earnest Sons, 158 N. Y. S. 627; Hubbard v. Syenite Trap Rock Co., 165 N. Y. S. 486; First Nat'l Bank v. Am. Langer Slate Co., 229 Pa. 27; Daniels v. Burlington N. B. & Mfg. Co., 84

right all shares, 1911, 1912, and 1913, and also for the purpose of selling the shares of the corporation. The shares of the corporation were sold and the proceeds were used for the purpose of the corporation. The shares of the corporation were sold and the proceeds were used for the purpose of the corporation.

Article 11 of the By-Laws provided:

"The seal of the corporation shall consist of a metal disc having engraved thereon the words 'First National Co. Corporation, Chicago, Illinois'."

At a meeting of the corporation held on April 10, 1913, a

resolution was adopted directing the secretary to procure

for the corporation, a corporate seal, to be made in conformity with

the By-Laws of the corporation; and that such seal shall be, and the

same is hereby adopted as and for the corporate seal of the corporation.

"Such seal was purchased immediately after the meeting

and thereafter was in use by the company and was in the custody of

its secretary. Mr. Marshall, the president, whose name is signed in

the lease, was not authorized to sign contracts on

behalf of the company, and no meeting of the board of directors was

ever called after the execution of the lease to vote upon the

question of its rescission.

Whatever the question in the first instance might be,

this uncontradicted evidence negates the theory that the corporation

was of this corporation was authorized to execute this lease.

There is no other course of dealing from which even remotely could

be implied, nor are there any facts leading to show that defendant

is estopped to deny his authority. The power of a private corporation

is primarily lodged in the hands of directors, and from

that source either expressly or by implication the authority of its

officers is not for the corporation must be derived. City of

Chicago v. Stein, 200 Ill. 409. Under the uncontradicted proof we

hold the treasurer did not have the power to execute this lease.

Stein v. Louis L. Stein, 200 Ill. 409. Under the uncontradicted proof we

N. J. Eq., 53.

For the reasons indicated the judgment is reversed with a finding of facts and judgment here for the defendant.

REVERSED WITH FINDING OF FACTS AND
JUDGMENT HERE FOR DEFENDANT.

McSurely, P. J., and O'Connor, J., concur.

he

1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 26

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Classification of Vessels and Documents under the Act

THE STATE OF TEXAS, COUNTY OF DALLAS, ss. I, _____, Clerk of the County, do hereby certify that the foregoing is a true and correct copy of the original as the same appears from the records of said County.

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35941

FINDING OF FACTS.

We find as facts that the lease upon which the suit of plaintiff was based was executed and delivered by the treasurer of the defendant company without authority either express or implied; that the execution of the lease was never ratified or approved by defendant and that defendant is not estopped to assert that the said lease was executed and delivered without authority by it so to do; that defendant is therefore entitled to a finding in this court in its favor and judgment for costs against plaintiff thereon.

It is the duty of the court to see that the law is
 enforced, and that the rights of the parties are
 protected. In the present case, the court finds that
 the defendant has failed to establish his case, and
 therefore the plaintiff is entitled to the judgment
 and costs. The court hereby awards the judgment
 and costs to the plaintiff, and dismisses the
 complaint of the defendant. The court also awards
 the costs of the proceedings to the plaintiff, and
 dismisses the complaint of the defendant.

35950

M. GRUSIN, doing business as
M. GRUSIN INVESTMENT CO.,
Appellee,

vs.

JOHN W. BARNES,
Appellant.

927
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 617²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff Grusin sued defendant Barnes alleging the conversion by defendant of a Studebaker automobile on or about July 1, 1930. The statement of claim averred that April 18, 1929, defendant executed and delivered a chattel mortgage to M. Grusin Investment Co., which conveyed the automobile as security for the payment of a note of the same date for \$1350 payable to M. Grusin Investment Co.

The affidavit of merits in substance denied the execution of the mortgage and note or that plaintiff was the owner of the same, and set up that the controversy had been adjudicated in another suit brought by one Gordon Brown to whom the note had been turned over by plaintiff. The affidavit of merits also set up alleged equities in favor of defendant growing out of transactions with the sales company from which the automobile was purchased.

The evidence for plaintiff tends to show that the note and the chattel mortgage were executed April 18, 1929, in a transaction between plaintiff and defendant, wherein plaintiff at defendant's request financed defendant in the purchase of the automobile. Defendant testified that he executed the papers in blank, but this testimony was denied by witnesses for plaintiff, and we are disposed to agree with the finding of the court on that point. The evidence is undisputed that default was made in payment of the note.

Defendant also offered evidence tending to show that in a later transaction on April 20, 1929, between one Lyseur, sales

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W. GRUSH, doing business as
W. GRUSH INVESTMENT CO.,
Associates.

vs.

JOHN F. HARRIS,
Associates.

OF CHICAGO.

288 I.A. 617

MR. JUSTICE WILLIAM BREWER THE CHIEF OF THE COURT.

Plaintiff seeks and defendant denies the execution of

version by defendant of a check for \$1000.00 on or about July 1,
1930. The statement of claim averred that April 18, 1930, defendant
and executed and delivered a check for \$1000.00 to W. Grush Investment
Co., which conveyed the automobile as security for the payment
of a note of the same date for \$1000.00 payable to W. Grush Investment
Co.

The affidavit of merits in substance denied the execution of
the mortgage and note or that plaintiff was the owner of the same,
and set up that the conveyance had been effected in another suit
brought by one Gordon Brown so when the note had been turned over
by plaintiff. The affidavit of merits also set up alleged equities
in favor of defendant growing out of transactions with the sales
company from which the automobile was purchased.

The evidence for plaintiff tends to show that the note and
the check mortgage were executed April 18, 1930, in a transaction
between plaintiff and defendant, wherein plaintiff as defendant's
agent financed defendant in the purchase of the automobile. Defendant
testified that he executed the papers in blank, but this
testimony was denied by witnesses for plaintiff, and we are disposed
to agree with the finding of the court on that point. The
evidence is undisputed that defendant was made in payment of the note.
Defendant also offered evidence tending to show that in a

agent for the M. C. Motor Sales Co., and defendant it was agreed that the purchase of the automobile should be made upon terms different from those before agreed upon, and defendant contends, citing section 26 of chapter 95 (Smith-Hurd's Ill. Rev. Stats. 1931, chap. 95, sec. 26, p. 1954) that in this suit the equities arising out of that transaction can be interposed as a defense. Plaintiff, however, was not, so far as the evidence shows, a party to that transaction, nor did he take the note by transfer from the Sales company; and the evidence does not tend to show that there was any privity between them. Such defense can therefore not be interposed. Moreover, the evidence shows without contradiction that over a period of many months defendant made payments to plaintiff upon this note, thus recognizing its validity. After suit was brought he undertook for the first time to interpose a claim that there were equities in his favor as between him and the Sales company growing out of the transaction in which he purchased the automobile from the Sales company.

Evidence was also offered by defendant for the purpose of showing that the note had been adjudged invalid in a suit brought thereon by one Gordon Brown. However, evidence was neither offered nor received tending to show that the note upon which Brown brought suit was this note or that it was a note transferred to Brown by plaintiff. Defendant cites Wright v. Griffey, 147 Ill. 496, to the proposition that when a controlling fact or question material to the issue of both causes has been adjudicated in a former suit by a court of competent jurisdiction and the same question is again at issue between the same parties, its adjudication, if properly presented, will be conclusive in the later case, and that parol evidence of what occurred upon the former trial and what was actually decided is always admissible in such cases. Undoubtedly that is the law, but the proof offered and received here fall

agent for the M. C. Motor Sales Co., and defendant it was agreed that the purchase of the automobile should be made from him. There is no direct evidence, and defendant denies, sitting session 22 of chapter 22 (Smith-Hurd's Ill. Rev. Stat. 1931, chap. 22, sec. 22, p. 1984) that in this case the evidence either out of that transaction can be introduced as a defense. Plaintiff, however, was not, as far as the evidence shows, a party to that transaction, nor did he take the note by transfer from the Motor Sales Co.; and the evidence does not tend to show that there was any privity between them. Such defense can therefore not be introduced. However, the evidence shows without contradiction that over a period of many months defendant made payments to plaintiff upon this note, thus recognizing its validity. After suit was brought he undertook for the first time to introduce a claim that there were equities in his favor as between him and the Motor Sales Company growing out of the transaction in which he purchased the automobile from the Motor Sales Company.

Witness was also allowed by defendant for the purpose of showing that the note had been obtained invalidly in a suit brought thereon by one Gordon Brown. However, evidence was neither offered nor received tending to show that the note was given Brown brought suit was this note or that it was a note transferred to Brown by plaintiff. Defendant cited Wright v. Gilkey, 147 Ill. 250, in the proposition that when a suit is brought to set aside a note on the issue of both parties has been established in a former suit by a court of competent jurisdiction and the same question is again at issue between the same parties, the judgment, if previously presented, will be conclusive in the later case, and that party's evidence of such judgment need not be repeated. Undoubtedly actually tested in every case. Undoubtedly

short of showing that either the causes of action or the parties are identical. Under such circumstances it cannot be held that the plea of res adjudicata was proved.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

about it showing that there is no reason to believe that the
 are identical. Under such circumstances it seems to follow that
 the case of the identical was solved.

The judgment of the court is that the evidence is sufficient.

REMARKS

Exhibit 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 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2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211,

35996

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

RAYMOND HALL,
Plaintiff in Error.

937
ERROR TO MUNICIPAL COURT
OF CHICAGO.

267 I.A. 617

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant by this writ of error seeks to reverse a judgment of the Municipal court of Chicago entered upon the finding of the court (the jury having been waived) that he was "guilty of the criminal offense of driving a motor vehicle upon a public highway in the State of Illinois, City of Chicago, while drunk or intoxicated." The sentence of the court was that defendant should be fined \$200 and costs and sentenced to the House of Correction for ninety days. No bill of exceptions has been preserved, and defendant argues, in the first place, that the information upon which he was tried and to which he pleaded not guilty did not state an offense, and, in the second place, that the judgment should be reversed because the finding was not responsive to the issue submitted to the court.

The record in this case shows that leave was given and the state's attorney filed an amended information which charged that defendant "on the 20th day of January, A. D. 1932, at the City of Chicago aforesaid, did then and there operate a motor vehicle upon a public highway of this State situated within the corporate limits of the City of Chicago aforesaid in a wanton or reckless manner, showing an utter disregard for the safety of others under circumstances likely to cause great bodily injury and did thereby

"

The printed form which was used in drawing this amended information contained four different counts. By this first count

STATE OF ILLINOIS
 Defendant in Error,

vs.

RAYMOND HALL,
 Plaintiff in Error.

267 I.A. 613

MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

Defendant by this writ of error seeks to reverse a judgment of the Municipal Court of Chicago entered upon the finding of the court (the jury having been waived) that he was "guilty of the criminal offense of driving a motor vehicle upon a public highway in the State of Illinois, City of Chicago, while drunk or intoxicated." The sentence of the court was that defendant should be fined \$500 and costs and sentenced to the House of Correction for ninety days. No bill of exceptions has been preserved, and defendant argues, in the first place, that the information upon which he was tried was to which he pleaded not guilty did not state an offense, and, in the second place, that the judgment should be reversed because the finding was not responsive to the issue submitted to the court.

The record in this case shows that leave was given and the state's attorney filed an amended information which charged that defendant "on the 22nd day of January, A. D. 1932, at the City of Chicago aforesaid, did then and there operate a motor vehicle upon a public highway at this State situated within the corporate limits of the City of Chicago aforesaid in a wicked or reckless manner, showing an utter disregard for the safety of others under circumstances likely to cause great bodily injury and his thereby

the pleader evidently intended to allege an offense under section 41 B of the Motor Vehicle law (Smith-Murd's Ill. Rev. Stats. 1931, chap. 121, p. 2534.) The other counts charging offenses under sections 41, 41A, 22 and 43 of this law were stricken out. It will be noted that one of the essential elements of the defense as defined in section 41 B is that defendant should have through his recklessness caused injury to another not resulting in death. That averment was left out of the information, and it therefore failed to charge an offense under this section of the statute. A motion in arrest of judgment was made and should have been granted. It has been held in cases too numerous to require extended citations that a conviction cannot be sustained even on a plea of guilty to an information which does not charge an offense. Klawanski v. People, 218 Ill. 481; People v. Martin, 314 Ill. 117, and People v. Barnes, 314 Ill., 140. The finding that defendant was guilty of driving while intoxicated was not responsive to the issue submitted to the court and would not sustain the finding that defendant was guilty as charged. Donovan v. People, 218 Ill. 523; People v. Brown, 312 Ill. 63.

No brief has been filed by the People in support of this judgment, which we must reverse.

REVERSED.

McSurely, P. J., and O'Connor, J., concur.

the plaintiff evidently intended to allege an offense under section 41 B of the Motor Vehicle law (McKenna's law, 111. Rev. Stat. 1921, chap. 181, p. 2234). The other counts charging offense under sections 41, 41A, 42 and 43 of this law were stricken out. It will be noted that one of the essential elements of the defense as set forth in section 41 B is that defendant should have through his recklessness caused injury to another not resulting in death. That element was left out of the indictment, and is therefore failed to charge an offense under this section of the statute. A motion in arrest of judgment was made and should have been granted. It has been held in cases too numerous to require extended citation that a conviction cannot be sustained even on a plea of guilty so an information which does not contain an element, State v. Taylor, 218 Ill. 481; People v. Taylor, 214 Ill. 117, and People v. Taylor, 214 Ill. 140. The finding that defendant was guilty of driving while intoxicated was not responsive to the issue submitted to the court and would not sustain the finding that defendant was guilty as charged. People v. Taylor, 214 Ill. 140; People v. Taylor, 214 Ill. 140. No brief has been filed by the people in support of this judgment, which we must reverse.

Reversed.
KORSELY, P. J., and C. GORMAN, J., concur.

36002

BEN BERNSTEIN and
LENA BERNSTEIN,
Defendants in Error,

v.

VALENTINE F. GLASS and
ELIZABETH GLASS, his wife,
Plaintiffs in Error.

94 7
ERROR TO MUNICIPAL COURT
OF CHICAGO.

267 I.A. 617⁵

MR. JUSTICE MACHETT DELIVERED THE OPINION OF THE COURT.

In an action upon a promissory note and on trial by the court, there was a finding for plaintiff in the sum of \$3,408.50, upon which the court, overruling motions for a new trial and in arrest, entered judgment. The defenses set up in separate amended affidavits of merits filed by defendants were in substance that the note sued on was executed and delivered pursuant to a written contract whereby plaintiffs agreed to convey to Valentine F. Glass certain real estate described in the contract; that only a part of the real estate described was conveyed; that defendants thereby were damaged to the amount of \$11,500, and that therefore there was nothing due on the note. In brief the defenses amount (1) to a plea of a partial failure of the consideration for the note, and (2) to the plea that plaintiff prior to the execution of the contract and afterwards made false representations as to the condition of the building on the premises upon which defendants relied to their damage.

The pleadings are unnecessarily voluminous. Plaintiffs in their statement of claim set up the contract for the conveyance of real estate. Upon the trial this document, as well as the deed made pursuant thereto, was received in evidence, and it appears

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NEW HAMPSHIRE and
MASSACHUSETTS
In Equity

YOUNG & RUBINSON
ATTORNEYS AT LAW
PLAINTIFFS IN EQUITY

ORDER TO DISMISS COMPLAINT
IN EQUITY

SET I.A. 317

THE COURT HONORABLE JUSTICE OF THE PEACE

In an action upon a promissory note and on trial by
the court, there was a finding for plaintiff in the sum of
\$2,400.00, upon which the court, overruling motion for a new
trial and an arrest, entered judgment. The following set of
exhibits amended exhibits of exhibits filed by defendants were in
evidence that the note and on the evidence and delivered payment
to a written contract whereby plaintiff agreed to convey to
Volunteer A. Chase certain real estate described in the complaint;
that only a part of the real estate described was conveyed; that
defendants thereby were charged to the amount of \$11,000, and that
therefore there was nothing due on the note. In brief the defense
alleged (1) as a part of a partial failure of the consideration for
the note, and (2) as the fact that plaintiff prior to the execution
of the contract and assignment made false representations as to the
condition of the building on the premises upon which defendants
relied in their payment.

The pleadings are unnecessarily voluminous. Plaintiff
in their statement of claim set up the contract for the conveyance
of real estate. Upon the trial this document, as well as the deed

that at the time of the execution and delivery of the deed, the contract was cancelled. The real estate conveyed by the deed does not conform to the description of the property as written into the contract, and plaintiffs contend (and we think the record fairly tends to show) that there was a mistake in the description as it appeared in the original contract. At any rate, the deed was accepted without protest so far as the evidence shows, and payments were made upon this note from time to time after the delivery of the deed.

The suit is not upon the contract which was cancelled but upon the note which was delivered in consideration of the transfer. Defendants contend that parol evidence was admissible for the purpose of showing a partial failure of consideration for the note. There is no doubt of that proposition, but on the other hand under the provisions of the Negotiable Instruments act (Smith-Eurd's Ill. Rev. Stats., 1931, chap. 98, par. 44, sec. 24, p. 1967) every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. The burden of proof was therefore upon defendants to show, if they could, a failure of consideration in whole or in part. In re Estate of Burke v. Sullivan, 247 Ill. App. 233; Solf v. Peoples Bank, 255 Ill. App. 127; Mt. Carmel v. Hoelard, 342 Ill. 148. The mere fact that there is a variance between the description set forth in the contract and that which appears in the deed, is not sufficient to establish that defense, where, as here, all the evidence indicates that the description contained in the contract is not the description which the parties actually intended. As the suit is upon the note and not upon the contract, that fact could be established by parol evidence. Some evidence was offered by defendants tending to show

that at the time of the execution and delivery of the deed, the contents were correct. The deed was signed by the donor and was not subject to the investigation of the property in relation to the contents, and plaintiff contends (and we think the record fairly tends to show) that there was a mistake in the description as it appeared in the original conveyance. As early as the deed was accepted without protest so far as the evidence shows, and documents were made upon that date, it was then as well when the delivery of the deed.

The suit is not upon the contract which was cancelled but upon the note which was delivered in consideration of the transfer. Defendant contends that there is no admissible evidence to show a partial failure of consideration for the purpose of rescinding the contract, but in the case there is no issue of that question, but in the case there is an issue of the validity of the deed and (Smith-Hurd's Ill. Rev. Stat., 1931, chap. 38, par. 41, sec. 26, p. 1287) every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon is deemed to have become a party thereto for value. The burden of proof was therefore upon defendant to show, if they could, a failure of consideration in whole or in part. In the case of Burke v. Sullivan, 247 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

that statements had been made by plaintiffs before and after the execution of the written contract with reference to the condition of the building situated on the land which were not true. However, it is not claimed that there was any breach in this respect of the written contract, and no evidence was offered or received tending to show that defendants had sustained damage by reason of these representations.

An examination of the whole record indicates that the alleged defenses are without merit. The attorney for defendants in response to questions by the court refused to deny that there was a mistake in the description of the premises as the same appeared in the written contract or to assert that the deed delivered failed to convey the real estate which the parties intended should be transferred at the time the contract was made.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

that statements had been made by Plaintiff before and after the execution of the written contract with reference to the condition of the building situated on the land which were not true. However, it is not claimed that there was any breach in this respect of the written contract, and no witness was offered to testify to the fact that Plaintiff had sustained damage by reason of these representations.

An examination of the deed recited that the alleged defendant and witness herein. The attorney for defendant in response to questions by the court returned to say that there was a mistake in the description of the premises as the same appeared in the written contract as he cannot find the deed delivered failed to convey the real estate which the parties intended should be transferred at the time the contract was made. The judgment is affirmed.

TESTIMONY.

Witnesses, P. J. and J. J. Connors, J. J. Connors.

36117

HARRY WOLCHINOVSKY, Conservator, etc.,
vs.

MADISON & KEDZIE STATE BANK, a
Corporation, et al.

LOUIS KASPAR et al.,
Appellees,

vs.

HARRY WOLCHINOVSKY, Conservator, etc.

MADISON & KEDZIE STATE BANK, a
Corporation, et al.

(MADISON & KEDZIE STATE BANK,
a Corporation,)

Appellant.

957
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

267 I.A. 618'

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case in various phases is now before this court for a fourth time upon appeal by the Madison & Kedzie State Bank from a final decree entered upon the amended cross bill of certain defendant bondholders. The decree was entered February 27, 1932. It recites that the bank had been theretofore named as trustee in several trust deeds with the Chicago Title & Trust Co. as first successor in trust, and Chicago Trust Co., the second successor in trust; that the Madison & Kedzie State Bank ceased to function as a banking institution; that by reason thereof it no longer may operate in its trust capacity, and that it is now in the hands of Will H. Wade, as receiver, in a cause theretofore commenced by the auditor of public accounts of the state of Illinois, whose duty it is to resign as trustee pursuant to the statute made and provided; that neither the first nor second successor in trust has accepted but has failed to do so; that while personally served as parties they failed to appear and were defaulted; that by reason thereof the office of the trustee became vacant, and that in order to preserve and protect the interest of all parties it is necessary that a trustee

WOLCHINOVSKY, INCORPORATED

vs.

ALBION & KENNETH STATE BANK, a Corporation, et al.

LOUIS KASPER et al.

vs.

ALBION & KENNETH STATE BANK, a Corporation, et al.

ALBION & KENNETH STATE BANK, a Corporation, et al.

(ALBION & KENNETH STATE BANK, a Corporation)

Appellants

STATE OF ILLINOIS

COUNTY OF COOK

818 L.A. 618

MR. JUSTICE RUTLEDGE DELIVERED THE OPINION OF THE COURT.

This case in various phases is now before this court for a fourth time upon appeal by the bank from a decree entered upon the merits under bill of certain defendants. The decree was entered February 27, 1938. It recites that the bank had been theretofore named as trustee in several trust deeds with the Chicago Title & Trust Co. as first mortgagee in trust, and Chicago Trust Co., the second mortgagee in trust; that the Madison & Nehalem State Bank seemed to function as a banking institution; that by reason thereof it no longer may operate in its trust capacity, and that it is now in the hands of Will H. Wade, as receiver, in a cause theretofore commenced by the auditor of public accounts of the state of Illinois, whose duty it is to receive and transmit payment to the state when and provided; that neither the first nor second mortgage in trust was assigned nor was failed to do so; that while the bank was in liquidation it was not to appear and was delinquent; that by reason thereof the auditor of public accounts was required to take in order to preserve and

be appointed to have and possess all the powers theretofore vested in the Madison & Kedsie State Bank under the several trust deeds. It was therefore ordered that said bank should be removed as trustee and the Straus National Bank & Trust Co. appointed to perform the functions and duties of the trustee.

The order further recites that in the initial proceedings the mortgagor sought to set aside trust deeds securing bonds in the aggregate amount of \$1,130,000 and that the trustee was made a party thereto; that it was necessary to file a cross bill for the purpose of protecting the interest of the bondholders and to have a new trustee appointed; that the solicitors for cross complainants have rendered valuable services in that connection which were reasonably worth the sum of \$6,000; that the same was a proper charge and first lien on the several parcels of real estate, and that the said sum should be paid the solicitors out of the money then in possession of the receiver or thereafter to be received by him or out of moneys that might come into the possession of the trustee during the course of administration.

It is contended in behalf of the Madison & Kedsie State Bank that it was error for the court to enter this decree for the reason that the cause was not at issue on the cross bill; that the answer of the bank thereto denying all the paragraphs of the bill except the first eight raised numerous clear-cut issues of fact which the court might not dispose of without hearing evidence upon which to base its decree. Bradner Smith & Co. v. Mason, 54 Ill. App. 258; C. P. & St. L. R. Co. v. St. L. P. & N. R. Co., 79 Ill. App. 384; Elair v. Reading, 99 Ill. 600; 21 Corpus Juris 578, are cited to this elementary proposition.

On the other hand, it is contended in behalf of cross complainants that no proof was necessary in view of the admission by the pleadings and the decree pro confesso against the Chicago

Title & Trust Co. as successor; that the Madison & Kedzie State Bank objected to the taking of proof and therefore may not now urge as error that such proof was not heard. The contention requires an examination of the pleadings, from which the following appears:

The cross bill contains 27 paragraphs. The answer of the Madison & Kedzie State Bank admits paragraphs 1 to 8 inclusive but denies each and every material allegation of all other paragraphs contained in the bill and demands strict proof thereof. These eight paragraphs of the cross bill asserts that Joseph Wolchinsky exhibited his bill of complaint seeking to set aside the five trust deeds executed by him; that the bill of complaint alleged that the bond issues and trust deeds were executed by him through fraud on the part of the Madison & Kedzie State Bank; that he sought to set aside the conveyances and remove the bank as trustee, and prayed for an accounting; that cross complainants were made parties defendant by the name and style of "unknown owners" or holders of the bonds secured by the trust deeds; that subsequent to the filing of the original bill of complaint, Joseph Wolchinsky was declared insane and Harry Wolchinsky was appointed conservator of his person and estate; that the conservator filed an amended bill of complaint, alleging the incapacity of Joseph Wolchinsky to execute the instruments, that certain bond issues against apartments named were construction loans secured by the trust deeds, that the bonds issued did not have any writing ^{thereon} stamped/in red letters informing the purchaser thereof that such was the fact, that the bank sold the bonds to the public, thereby perpetrating a fraud upon every purchaser of the bonds, that the income from the several parcels of real estate was received by the defendant bank by virtue of assignments of rents which it obtained from Joseph Wolchinsky, which amounted to \$613,000,

Little & Trust Co. as successor; that the Madison & Kehoe State Bank objected to the taking of proof and therefore may not now urge as error that such proof was not heard. The commission requires an examination of the pleadings, from which the following appears:

The cross bill contains 27 paragraphs. The answer of the Madison & Kehoe State Bank admits paragraphs 1 to 3 inclusive but denies each and every material allegation of all other paragraphs contained in the bill and demands strict proof thereof. These eight paragraphs of the cross bill reserve that Joseph Wolfenbarger exhibited his bill of complaint seeking to set aside the five trust deeds executed by him; that the bill of complaint alleged that the bond issues and trust deeds were executed by him through fraud on the part of the Madison & Kehoe State Bank; that he sought to set aside the conveyances and remove the same as trustee, and prayed for an accounting; that cross complainants were made parties defendant by the name and style of "unknown owners" or holders of the bonds secured by the trust deeds; that subsequent to the filing of the original bill of complaint, Joseph Wolfenbarger was declared insane and Harry Wolfenbarger was appointed conservator of his person and estate; that the answer filed an amended bill of complaint, alleging the insolvency of Joseph Wolfenbarger in securing the individuals, from certain bond issues against apartment houses were constituted loans secured by the trust deeds, that the bonds issued did not have any selling stamp in the bottom left-hand corner of the bonds, that the fact, that the bonds sold the bonds at the public, thereby perpetrating a fraud upon every purchaser of the bonds, that the income from the several parties of real estate was received by the defendant here by virtue of assignments of rents which

that a reasonable estimate of the cost of operating the properties was \$174,000; that the bank did not properly manage the properties; that it permitted them to be sold for non-payment of taxes, and that the amended bill prayed that a receiver be appointed of all the properties and also a new trustee, and alleged that Will H. Wade was appointed receiver of the bank in a proceeding commenced by the auditor of public accounts; that certain bond owners filed a petition setting up their interest in the properties and praying that the Madison & Kedzie State Bank be removed as trustee and a successor trustee and a receiver be appointed; that the Madison & Kedzie State Bank filed its answer to the petition, admitting the execution of the assignments of rents, that Wade was appointed receiver of the bank and was collecting the rents, that certain of said bonds were in default and many of the properties had been sold for taxes, but claiming that the defaults or sales for taxes were not due to any negligence on its part; that the cross complainants are owners of certain of the bonds described in the trust deeds and had no knowledge of the matters contained in the charges and proceedings in the case until the time they filed the cross bill of complaint in their own behalf and for the benefit of all other bondholders, except Will H. Wade, as receiver, who also is a bondholder.

It is apparent, we think, considering these eight paragraphs together with the answer, that the answer goes no further than to admit that the proceedings which are recited were taken, but that it does not admit that the allegations made in such proceedings are true. The admission that certain pleadings setting up these allegations had been filed cannot be construed as an admission that the matters therein alleged are true. The certificate of evidence shows that when the matter came up for hearing on February 26, 1932, the solicitor for cross complainants stated that

that a reasonable estimate of the cost of operating the properties was \$15,000; that the bank did not properly manage the properties; that it permitted them to be sold for non-payment of taxes, and that the amended bill prayed that a receiver be appointed of all the properties and also a new trustee, and alleged that Will E. Wade was appointed receiver of the bank in a proceeding commenced by the auditor of public accounts; that certain bonds were filed a petition setting up their interest in the properties and praying that the Madison & Keokuk State Bank be removed as trustee and a successor trustee and a receiver be appointed; that the Madison & Keokuk State Bank filed its answer to the petition, admitting the execution of the assignments of trusts, that Wade was appointed receiver of the bank and was collecting the bonds, that certain of said bonds were in default and many of the trustees had been paid for taxes, but claiming that the default on sales for taxes were not due to any negligence on its part; that the cross-complainants are owners of certain of the bonds described in the first bonds and had no knowledge of the matters contained in the charges and proceedings in the case until the time they filed the amended bill of complaint in their own behalf and for the benefit of all other bondholders, except Will E. Wade, as receiver, who also is a bondholder.

It is apparent, we think, considering these facts, that when taken together with the answer, that the answer does not further than to admit that the proceedings which are resisted were taken, but that it does not admit that the allegations made in each proceeding are true. The admission that certain allegations setting up these allegations had been filed cannot be construed as an admission that the parties hereto alleged are true. The court in its opinion states that when the matter came up for hearing on

the cause was at issue and that an answer had been filed by the Madison & Kedzie State Bank admitting practically every allegation against the Bank, and claimed that under the answer he was entitled to the appointment of a trustee, the successor in trust, the Chicago Title & Trust Co., and the second successor in trust having been defaulted; that the solicitor for the Bank objected, stating that the case was not at issue and that he had been informed that the receiver for the bank had not yet filed his answer; that cross complainants then dismissed as to the receiver, whereupon the solicitor for the defendant bank stated that the answer had denied every allegation of the bill except the first eight paragraphs, which merely recited that a bill had been filed, and that there were issues of fact which should be tried; that the solicitor for the defendant bank stated his point to be that a denial had been filed to every paragraph of the bill which requested the appointment of a successor trustee, that an issue of fact had been raised, and that the court could not appoint a trustee until these issues had been decided; that the solicitor for cross complainants there contended (and he now argues) that the answer admitted that the trust deeds had been executed through fraud on the part of the Madison & Kedzie State Bank, and that the bank was then in possession of the properties, and he went over each of the first seven paragraphs of the cross bill; that the court listened to the argument and took the matter under advisement; that the solicitor for cross complainants was then sworn to testify as to the value of services rendered by his firm in the matter; that in the course of that testimony the following colloquy occurred:

"Mr. Abrams (solicitor for cross complainants): I am also going to testify to something else.

Mr. Smith (solicitor for defendant bank): I object to any testimony along that line.

Mr. Abrams: This is not a part of the services. This is to prove some of the allegations of my bill.

Mr. Smith: I object to any testimony on that.

Mr. Abrams: I have a right to testify.

the answer was at issue and that an answer had been filed by the Madison & Lakeville Bank advising judicially every allegation against the bank, and claimed that under the answer he was entitled to the appointment of a trustee, the successor in trust, the Chicago Title & Trust Co., and the second successor in trust having been admitted; that the solicitor for the bank objected, stating that the case was not at issue and that he had been informed that the receiver for the bank had not yet filed his answer; that cross-complaints then dismissed as to the receiver, whereupon the solicitor for the defendant bank stated that the answer had denied every allegation of the bill except the first about partnership, which merely recited that a bill had been filed, and that there were issues of fact which should be tried; that the solicitor for the defendant bank stated his point to be that a denial had been filed to every paragraph of the bill which repeated the appointment of a successor trustee, that an issue of fact had been raised, and that the court could not appoint a trustee until these issues had been decided; that the solicitor for the defendant bank then stated (and he now argues) that the answer admitted that the trust deed had been executed through fraud on the part of the Madison & Lakeville Bank, and that the bank was then in possession of the property, and he went over each of the first seven paragraphs of the cross bill; that the point was made to the argument and took the matter under advisement; that the solicitor for cross-complaints was then sworn to testify as to the value of services rendered by his firm in the matter; that in the course of that testimony the following testimony occurred:

"Mr. Attorney (solicitor for cross-complaints): I am also sworn to testify as to the value of services rendered by my firm (solicitor for defendant bank); I object to any testimony given by him."

Mr. Attorney: This is not a matter of law, it is to prove some of the allegations of my bill.

The Court: No, no, I will sustain the objection to that. I do not think it is material on the question of proof of services rendered in this case.

Mr. Abrams: It is not in connection with services. I want to prove the allegations of the bill with reference to the fraud of the Madison & Kedzie State Bank.

The Court: They do not admit that.

Mr. Smith: No, certainly not. They deny it.

The Court: No. Those are matters I will refer to a master."

As the issues except that of solicitor's fees had already been submitted to the court without evidence other than the pleadings, we think the court properly sustained the objection of defendant bank. In view of the fact that the decree was therefore entered without admissions in the pleadings or evidence tending to prove the material allegations, it follows that the decree must be reversed.

The cross complainants, however, urge the further point that the Madison & Kedzie State Bank on the uncontradicted facts is without any interest that will authorize it to prosecute this appeal; that as an insolvent bank it could not perform the functions of an acting trustee; that the effect of the appointment of a receiver was to wholly incapacitate the bank from the performance of trust business and duties; that Wade, who was appointed receiver by the state auditor, was not a successor trustee; that the turning over of the trust property to him for management was in violation of the trust duties which was sufficient to remove the trustee and declare its office vacant. This court has held to the contrary in the recent case of Belofsky v. Johnson, 266 Ill. App. 351, where, construing section 11 of the act in relation to banks (Cahill's Ill. Rev. Stats. 1931, chap. 16A, par. 11, p. 170) we held that in the absence of any showing that the receiver who had been appointed was not proceeding with due diligence in making an accounting on behalf of the bank as trustee, we would assume that he was performing his duties as required by the statute; that under such circumstances there was no vacancy in the trusteeship, and that the court should

The Court: No, no, I will explain the objection to that.
I do not think it is material on the question of liability
rendered in this case.
Mr. Adams: It is not in connection with liability. I want
to prove the allegations of the bill filed for review to the Court of
the Madison & Kansas State Bank.
The Court: That is not what I want.
Mr. Adams: No, certainly not. That is all I want.
The Court: No. Those are matters I will refer to a master.

As the issues except that of liability have been already
been submitted to the Court without evidence other than the plead-
ings, we take the Court's word for the allegations of the
Complaint. In view of the fact that the bank was therefore
entered without admissions in the pleadings or evidence tending to
prove the material allegations, it follows that the issues must be
referred.

The above complaints, however, urge the further point that
the Madison & Kansas State Bank on the reconstituted basis is with-
out any interest that will entitle it to prosecute this appeal;
that as an insolvent bank it could not sustain the functions of an
acting trustee; that the effect of the appointment of a receiver was
to wholly insulate the bank from the performance of trust func-
tions and duties; that here, who was appointed receiver by the state
auditor, was not a successor trustee; that the turning over of the
trust property to him for management was in violation of the trust
duties which were entitling to remove the trustee and declare
his office vacant. This court has held to the contrary in the
recent case of Madison & Kansas State Bank v. Adams, 100 Kan. 111, 170 P. 2d 111.
Reviewing section 12 of the act in relation to banks (Smith's 111,
Rev. Stat. 1901, chap. 18A, sec. 11, p. 170) we hold that in the
absence of any showing that the receiver who had been appointed was
not proceeding with the diligence in making an accounting on behalf
of the bank as trustee, we would assume that he was carrying his
duties as trustee for the receiver with due diligence.

not have appointed a receiver of the premises. A precisely similar situation exists here. The court has the power to compel the receiver of this trustee bank to proceed diligently to render the account as trustee in order that the successor in trust may take over the duties of its office. There is no competent evidence in this record that the successor in trust named and selected by the parties in interest is not ready, competent and willing to take up the duties of that office when the accounting shall have been completed. The appointment of a receiver or the appointment of another trustee in the meantime could have the effect only of burdening this estate with unnecessary costs and expenses. The solicitor for a few of the bondholders should not be permitted to encumber and imperil the rights of all the bondholders by expensive and unnecessary proceedings of this kind.

For the reasons indicated the decree will be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

Not have appointed a receiver of the premises. A precisely similar situation exists here. The court has the power to compel the receiver of this trustee bank to proceed diligently to render the account as trustee in order that the executor in turn may take over the duties of his office. There is no competent evidence in this record that the trustee in turn named and selected by the trustee in question is not ready, competent and willing to take up the duties of his office and the court will not interfere to complete the appointment of a receiver or the appointment of another trustee in the meantime until such time as the trustee in question has been appointed and accepted. The executor for a few of the beneficiaries should not be permitted to encumber and imperil the rights of all the beneficiaries by extensive and unnecessary proceedings of this kind.

For the reasons indicated the decree will be reversed and the cause remanded for further proceedings.

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36134

HARRY WOLCHINOVSKY, Conservator, etc.,

vs.

MADISON & KEDZIE STATE BANK,
a Corporation, et al.,

STRAUS NATIONAL BANK & TRUST CO.,
etc., et al.,
(Cross-Complainants) Appellees,

vs.

HARRY WOLCHINOVSKY, Conservator, etc.,
et al., and MADISON & KEDZIE STATE
BANK,
(Cross-Defendants).

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
OF COOK COUNTY.

267 I.A. 618²

On the Interlocutory Appeal of
MADISON & KEDZIE STATE BANK,
Appellant.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The Madison & Kedzie State Bank has perfected this appeal
from an interlocutory order entered April 2, 1932, which provides:

"It is Therefore Ordered, Adjudged and Decreed that for the
purpose of removing any doubt with reference to the receivership
had on the extension order heretofore entered, that F. T. Dustin,
the Receiver heretofore appointed under the extension order, be,
and is hereby appointed as Receiver under the Cross Bill of Com-
plaint herein filed to have the same power as was vested in him
under the original order and to collect the rents, issues and
profits thereof and to manage, operate and lease the premises
described in the amended Bill of Complaint and Cross Bill of
Complaint."

The record shows that Joseph Wolchinovsky filed the original
and certain amended bills in which he alleged that he was the owner
of six different parcels of real estate specifically described; that
upon dates named he transferred these premises to the Madison &
Kedzie State Bank as trustee to secure certain issues of bonds; that
the execution of these trust deeds was obtained by undue influence
and fraudulent representations, and prayed that the same might be
cancelled and set aside.

On December 24, 1931, upon petition of complainant and of certain intervening bondholders, an order was entered appointing F. T. Dustin a receiver for the premises in controversy. From that order the Madison & Kedzie State Bank as trustee perfected an appeal. The cause was docketed in this court as No. 35856. The bondholders filed pleas questioning the right and capacity of the Madison & Kedzie State Bank to prosecute the appeal upon several grounds, some of these being that the Bank had been removed as trustee and a new trustee appointed; that the auditor of public accounts had taken possession of the bank and appointed one Wade receiver of it, and that Wade had accepted and qualified and was in possession of all its property. Complainant, Joseph Wolchinovsky, having been adjudged insane, his appearance was entered by his conservator, Harry Wolchinovsky, who filed a confession of error and moved that the order appointing a receiver be reversed and set aside. The order was reversed March 18, 1932. The mandate of this court was filed in the trial court March 31, 1932. Prior to the filing of that mandate, on February 27, 1932, the court entered a final decree upon the cross bill. This decree removed the Madison & Kedzie State Bank as trustee and appointed the Straus National Bank & Trust Co. as trustee under the several trust deeds and found that the solicitors for complainant had rendered legal services of the value of \$6,000 which was made a first lien upon the several parcels of real estate. From that decree the Madison & Kedzie State Bank prayed for and was allowed an appeal to this court, which has been perfected and is now pending in this court as Gen. No. 36117. The appeal bond in that case was filed March 26, 1932. It therefore appears that this interlocutory order appointing a receiver was entered by the trial court while an appeal was pending undisposed of in this court from a final decree entered on the cross bill.

The cross complainants made a motion in this court to dismiss the appeal upon the ground that the order of April 2, 1932, was

On December 24, 1931, upon petition of complainant and of
certain interested individuals, an order was entered appointing
J. T. Austin a receiver for the estates in controversy. From that
order the Madison & Keshish State Bank as trustee withdrew an appeal.
The cause was docketed in this court as No. 35500. The respondents
filed pleas questioning the right and capacity of the Madison &
Keshish State Bank to prosecute the appeal upon several grounds,
some of these being that the bank had been removed as trustee and a
new trustee appointed; that the auditor of public accounts had taken
possession of the bank and appointed one John receiver of it, and
that Wade had accepted and qualified and was in possession of all
its property. Complainant, James Williamson, being then residing
in Idaho, his appearance was entered by his counsel, Harry Wolfman-
ovsky, who filed a confession of error and moved that the order ap-
pointing a receiver be reversed and set aside. The order was re-
versed March 13, 1932. The motion of this court was filed in the
trial court March 21, 1932. Prior to the filing of that motion,
on February 27, 1932, the court entered a final decree upon the
above bill. This decree removed the Madison & Keshish State Bank as
trustee and appointed the James Williamson Bank & Trust Co. as trustee
of the several trust funds and found that the said Madison &
Keshish State Bank had received legal notice of the filing of the bill
and made a final plea upon the several grounds it then set out. From
that decree the Madison & Keshish State Bank moved for and was al-
lowed an appeal to this court, which has been docketed and is now
pending in this court as No. 35511. The appeal bond in that
case was filed March 24, 1932. It is hereby agreed that this in-
terlocutory order appointing a receiver was entered by the trial
court while an appeal was pending and in violation of its duty from
a final decree entered on the above bill.

not appealable under the statute. That motion was denied, and while the question is reargued in the brief with citation of many authorities, we adhere to our decision.

The appointment of this receiver was entered upon the cross bill and upon the motion of the solicitors for a part of the bondholders. It was made after March 26, 1932, upon which date the Madison & Kedzie State Bank had perfected an appeal from the final order appointing a successor trustee which is still pending in this court. The effect of perfecting that appeal was to stay further proceedings by the court which rendered the judgment or decree appealed from until such time as that appeal had been disposed of by this court. Such is the general rule stated in practically all the cases. People v. Pam, 276 Ill. 181. As that case points out, an exception to the rule is that in divorce cases after an appeal has been perfected a trial court may make a further order as to alimony, but this is expressly authorized by the statute.

In Heyman v. Heyman, 117 Ill. App. 542, this court, in an opinion by Mr. Presiding Justice Baker, after a thorough review of the cases, stated the law as follows:

"The statutes of this state have, from the earliest days, provided for appeals from judgments at law as well as decrees in chancery, and there is an unbroken line of decisions to the effect that a perfected appeal operates as a supersedeas or stay of proceedings under the judgment or decree."

In Masters v. Masters, 249 Ill. App. 252, this rule of law was interpreted as preventing the lower court from permitting any one to intervene while an appeal was pending in the Supreme court. It was there said:

"The law is well settled that when an appeal in the case is perfected to a Supreme or Appellate court, the court from which the appeal has been taken loses jurisdiction of the case until after the appeal has been finally disposed of by Appellate Tribunal."

Moreover, we are of the opinion that even assuming that the lower court had authority to appoint a receiver while the cause was pending in this court, it was not necessary to protect the interests

Not applicable under the statute. That motion was denied, and while the question is reargued in the trial with citation of many authorities, we adhere to our decision.

The assignment of this receiver was entered upon the cross will and upon the motion of the collector for a part of the bond- holders. It was made after March 22, 1933, upon which date the Madison & Kentucky State Bank had perfected an appeal from the trial court holding a receiver thereof. It is still pending in this court. The effect of certiorari that appeal was to stay

former proceedings by the court which rendered the judgment or decree appealed from until such time as that appeal had been disposed of by this court. Such is the general rule stated in precedents all the cases. Truitt v. Truitt, 295 Ill. 181. In that case points out an exception to the rule is that in divorce cases after an appeal has been perfected a trial court may make a further order as to alimony, but this is expressly authorized by the statute.

In Harman v. Harman, 317 Ill. App. 242, this court, in an opinion by Mr. Presiding Justice Carter, after a thorough review of the cases, stated the law as follows: "The statutes of this State have, from the earliest days, provided for appeals from judgments as law as well as judgments in equity, and there is no material line of distinction in the matter and a certified appeal operates as a suspension of the proceedings under the judgment or decree."

In Harman v. Harman, 317 Ill. App. 242, this court of law was interpreted as preventing the lower court from proceeding any one to intervene while an appeal was pending in the Supreme court. It was there held:

"The law is well settled that when an appeal is taken to the Supreme or Appellate court, the court from which the appeal has been taken loses jurisdiction of the case until after the appeal has been finally disposed of by Appellate Tribunal."

Moreover, we are of the opinion that even assuming that the lower court had authority to appoint a receiver while the appeal was

either of the cross complainants or of other bondholders. This court has so held in a quite recent and well considered case to which this bank was a party. Belofsky v. Johnson, 266 Ill. App. 351. It is unnecessary here to add anything to what was said in that opinion. The opinions of this court are uniformly to the effect that the appointment of a receiver is an extraordinary remedy; that it should be exercised with great care and caution, not alone because it may arbitrarily deprive an owner of the right to the use and possession of his property but also because (if unnecessary) it burdens the interests of all the litigants with fees and expenses. Davis v. Blair, 252 Ill. App. 417, and Frank v. Siegel, 263 Ill. App. 316, are two of the many cases which might be cited.

The order appealed from is reversed.

ORDER REVERSED.

McSurely, F. J., and O'Connor, J., concur.

either of the gross complaints or of other bondholders. This court has no hold in a quiet recent and well considered case to which this court was a party. Winters v. Winters, 111. 107. It is unnecessary here to add anything to what was said in that opinion. The opinion of this court was uniformly to the effect that the appointment of a receiver is an extraordinary remedy; that it should be exercised with great care and caution, not alone because it may arbitrarily deprive an owner of the right to the use and possession of his property but also because (if necessary) it interferes with the interests of all the creditors who are not known. Winters v. Winters, 111. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

The order appealed from is reversed.

CALVIN HENNING.

Respectfully, J. J. and O'Connor, Attorneys.

SAMUEL MARSHALL,
(plaintiff),
Appellee,

v.

OSCAR E. NELSON,
(defendant),
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE KERGER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment recovered upon a verdict of a jury by plaintiff against defendant for \$10,500.

The declaration contains three counts. The negligence averred in each count is as follows:

First count: That defendant, by his agent or servant, owned and controlled an automobile, being driven along route 31 in a northerly direction between Half-Day and Wheeling, Illinois, and plaintiff was at the same time driving a motor vehicle in a southerly direction along the same highway at the same place. Defendant, by his servant, carelessly and negligently operated and controlled his automobile, so that it ran into and collided with the automobile which plaintiff was driving, causing injury to plaintiff.

Third count: That defendant, contrary to the statute, when driving and meeting a motor vehicle coming in the opposite direction, failed to reasonably turn to the right of the center of the beaten track of said highway so as to pass without interference, and on the contrary drove his said automobile, by his agent, on the wrong side of said public highway and into the beaten path of the

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General and Special Agent in Charge

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FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C.

TO : SAC, NEW YORK
FROM : SAC, NEW YORK
SUBJECT: [Illegible]
[Illegible text follows, consisting of several paragraphs of a memorandum format.]

automobile in which plaintiff was driving, so that and by reason of the premises the automobiles collided and plaintiff was injured.

Fourth count: That defendant drove his automobile on the said highway at a speed greater than was reasonable and proper, having regard to the traffic and the use of the way, so that by reason of the premises defendant's automobile collided with plaintiff's automobile, causing injury.

Each of the counts alleged that plaintiff was at all times in the exercise of due care and caution for his own safety.

The defendant pleaded the general issue and a plea of non-operation.

Plaintiff, a man about 40 years of age, who had been driving an automobile for 20 years, testified that on May 10, 1930, he was driving a Willys-Knight automobile, with a Mrs. Ostroff as a passenger, in a southerly direction on Milwaukee avenue (route 31), an 18 or 20 foot hard surface road; that proceeding him was a truck moving about 10 to 15 miles an hour; that he passed the truck and proceeded south on the west side of the road; that after he passed the truck he noticed a few cars coming toward him some 500 or 700 feet away and that he noticed defendant's automobile turn out and pass some of these automobiles; that after defendant's automobile had passed a couple of the automobiles he turned to the east, or his right, and then swung to the west and came over to the west side of the road or southbound traffic lane, and the right ^{front} of defendant's automobile struck plaintiff's left front; that at the time of the impact, defendant's automobile was headed in a northwesterly direction and that the front wheels of plaintiff's automobile were off the road; that when plaintiff saw defendant swing across in front of plaintiff's automobile, he was about 50 to 75 feet away; that plaintiff got on his brakes and turned off the road and when defendant struck plaintiff, plaintiff's right front wheel was off the pavement.

Helen Gottroff testified she was a passenger in plaintiff's automobile; that as they proceeded southward she saw a milk truck ahead and followed it about one mile; then plaintiff passed it and drove on, on the west side of the road; that at the time he passed the truck there were no automobiles close to them, but there were some automobiles four or five blocks away; that later when plaintiff was on the west side of the road defendant's automobile came over from the east side of the road to the west side and passed some of the automobiles ahead of him and returned into line and then defendant tried to pass again, but came over pretty far to the west side of the road and ran into plaintiff's automobile.

Lawrence E. Stanton testified that on the day in question he was employed by the Bowman Dairy Company and was driving a truck south on Milwaukee avenue and witnessed the accident; that just prior to the accident plaintiff passed his truck and continued on south in the west lane about 125 to 130 feet before the accident, and the witness was 50 to 75 feet back of the automobile at the time of the accident; that at the same time plaintiff's automobile passed the truck, the witness saw four or five automobiles coming from the south, the nearest being then two or three hundred yards ahead of him; that he saw defendant's automobile pull out from behind these automobiles, pass on their left and then it got back into line and in so doing went a little off the road, and then it swung to its left directly in the path of plaintiff's automobile in the right (west) lane of the road, the right front of defendant's automobile and the left front of plaintiff's automobile collided head on.

Gust A. Herberg, Mrs. Gust A. Herberg and Sven Anderson were passengers in the automobile being driven by Algot Herberg. Stanley Erickson and Mrs. Oscar Nelson were passengers in the automobile being driven by Clarence Erickson.

Defendant's version as shown by the evidence of Clarence Erickson, Stanley Erickson, Gust A. Norberg, Mrs. Gust A. Norberg, Algot Norberg, Sven Anderson, Carl Lisell, Paul Kessro and Gustave Kessro, is, that Clarence Erickson, a 15 year old boy, was driving defendant's automobile north on Milwaukee avenue, preceded by an automobile driven by Algot Norberg; that a truck was being driven south and when the Norberg automobile and the truck were close together, plaintiff suddenly turned from the rear of the truck into the path of the Norberg automobile; thereupon, to avoid striking plaintiff, the Norberg automobile swerved to the right, and as plaintiff's automobile endeavored to return to his own side of the road, the collision occurred.

Carl Lisell was driving his automobile north on Milwaukee avenue and saw the truck coming south; that there were three automobiles following one another, the Norberg, defendant's and another automobile; that he heard a crash when he was about 100 to 150 feet behind the last automobile and saw plaintiff's automobile thrown from the right (east) side of the road to the west side of the road.

Gustave Kessro, a farmer, was on the east side of Milwaukee avenue 150 feet from the road and saw an automobile trying to pass the truck and at the same time he saw an automobile coming from the south a little ahead of the truck and the automobile going south; he turned away and next heard a crash, looked up and saw the truck was just coming to a stop, and the two automobiles were standing still, facing west on the road, the front part of each car, 2 or 4 feet apart, off the road; that the automobiles were only 50 feet apart at the time plaintiff started to pass the truck.

Paul Kessro, a son of Gustave, testified he was working in the field about opposite to where the collision took place and saw plaintiff's automobile pass the truck and drive the Norberg

automobile off the road, and then defendant's automobile struck plaintiff's automobile on the east side of the road and they both slid over to the west side; that the automobiles were in the position of a triangle when the collision occurred; that plaintiff's automobile was half a car length in front of the truck, when it started to turn; that the left side of both automobiles came together.

Joseph Ernsbaw, a state highway policeman, testified he interviewed Mrs. Guttroff at the hospital after the accident and that she told him it was plaintiff's fault; that he tried to pass the truck and did not have room to do it in.

Edward Bevetny, defendant's partner, testified that he heard Mrs. Guttroff make the statement testified to by Ernsbaw. Helen Guttroff denied she ever made such a statement.

It is contended by defendant that the judgment should be reversed because the preponderance of the evidence is in favor of defendant and that the verdict is against the weight of the evidence. The question of preponderance does not arise at all in this court. (Beane, Bookbush & Co. v. Moore Clayton Lumber Co., 228 Ill. App. 297, 290; Miller & Co. v. Duke, 232 Ill. App. 277, 280; Leopold v. Gatz, 263 Ill. App. 176, 183; Rumohr v. East St. L. & S. Ry. Co., 232 Ill. App. 450, 457.) It is only when the reviewing court sees and says that the verdict is against the manifest weight of the evidence that it is justified in reversing the cause. (Finer v. Miller, 228 Ill. App. 468, 470.) There is a hopeless and irreconcilable conflict in the evidence relative to the manner in which the accident occurred. The verdict of the jury imports that they did not believe defendant's witnesses. However, notwithstanding the verdict, it is the duty of this court to examine and weigh the evidence, but this duty does not require nor permit this court to substitute its judgment for

that of the jury on a pure question of fact unless the court can say that the conclusion reached by the jury is palpably wrong. (Chicago Union Traction Co. v. O'Donnell, 113 Ill. App. 250, 261; Welsh v. Chicago City Br. Co., 185 Ill. App. 146, 152; L. Co. B. E. Co. v. Gillis, 48 Ill. 317, 319; Calvert v. Carpenter et al., 31 Ill. 63; Chetelier et al. v. Singer et al., 121 Id. 244, 246; Hollenbeck v. Cook, 130 Id. 68.) Whether the plaintiff and his witnesses were to be believed, or whether the truth was on the side of the defendant was a question for the jury. They had an opportunity to see and hear and observe the appearance of the witnesses and their manner of testifying and were in a much better position to determine the truth relative to the manner in which the accident occurred, than a court of review. The verdict of the jury means that they believed plaintiff and his witnesses and disbelieved defendant's witnesses, and this they had a right to do. (Fodalski v. Simpson, 130 Ill. 540; Kennedy v. Modern Woodmen, 243 Id. 560.) After carefully examining and weighing the evidence and the apparent conflicts therein, we have reached the conclusion that we would not be warranted in holding the verdict and judgment against the manifest weight of the evidence.

It is also urged that plaintiff was guilty of contributory negligence. The question of contributory negligence is usually a question for the jury. It only becomes one of law when the undisputed evidence is so conclusive that it is clearly seen that the accident resulted from the negligence of the party injured and could have been avoided by the use of reasonable precaution. (Miller v. Peabody, 222 Ill. 330.) Having in mind the testimony and applying this rule to the instant case, we are of the opinion the question was one of fact for the jury.

It is next contended the cause went to the jury on the wilful and wanton conduct, and that there is no evidence to sustain it. There is no merit in this contention for the reason that the second count of the declaration charging wilful and wanton conduct on the part of the defendant was, on motion of plaintiff's attorney before the cause was submitted to the jury, dismissed. (North Chicago St. Ry. Co. v. Hutchinson, 193 Ill. 304.)

It is also claimed that the court erred in instructing the jury. The only instruction complained of informed the jury of the allegations of the three counts of the declaration and concluded: "If you believe from a preponderance of the evidence, under the instructions of the court, that the plaintiff has proved the allegations contained in one or all of the said counts of his said declaration, as above set forth, and that he was then and there and at all times prior thereto in the exercise of ordinary care for his own safety, then you should find the defendant guilty." It is argued this instruction directed a verdict, and that it did not contain all the elements necessary to prove the cause of action. The rule is that an instruction directing a verdict for the plaintiff, if the jury believe he has proved his case by a preponderance of the evidence, as laid in his declaration, can only be justified when the declaration contains a complete statement of the cause of action. (Krieger v. A. & O. R. R. Co., 242 Ill. 344; I. C. R. R. Co. v. Smith, 208 Id. 408; Cramer v. Barber's Coal Co., 246 Id. 481, 482; Controll v. Harding, 249 Id. 334, 335.) By the instruction the court told the jury that the negligence charged in the first count of the declaration was that defendant, by his agent, so carelessly and negligently operated his automobile that it ran into and against and collided with the automobile which the plaintiff was driving, and so

the world, but the world is not a single entity. It is a collection of many different things, and each thing is different from the others. The world is a complex system, and it is not possible to understand it by looking at it from a single perspective. The world is a collection of many different things, and each thing is different from the others. The world is a complex system, and it is not possible to understand it by looking at it from a single perspective.

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a result plaintiff was injured; that in the third count the negligence charged was that defendant, by his agent, failed to reasonably keep to the right of the center of the beaten track of the highway so as to pass without interference when meeting a motor vehicle coming in the opposite direction, and on the contrary drove his automobile, by his agent, on the wrong side of said public highway contrary to the statute, so that the automobile of the defendant collided with the automobile which plaintiff was driving, etc.; and that in the fourth count it was charged that defendant, by his servant, carelessly and negligently drove his automobile on said public highway at a rate of speed greater than was reasonable and proper, having regard to the traffic and the use of the way so as to endanger life and limb or injure the property of another person, so that the automobile of the defendant ran into, against, and collided with the automobile which plaintiff was driving, etc. Without going into a discussion of the different cases in which the Supreme Court has discussed instructions of the character now objected to, we are of the opinion, taking into consideration the instruction as given to the jury, the facts as disclosed by the proofs, and the instructions given on behalf of the defendant, the trial court did not err in the giving of this instruction. (M. Olive Coal Co. v. Rademacher, 190 Ill. 538, 542; Chicago City Ry. Co. v. Carroll, 204 Ill. 318, 331, and cases cited.

Defendant further criticized the giving of this instruction on the ground that the third and fourth counts charged a violation of the statute; that in order that the statute apply it must appear that the parties were driving on a public highway in the State of Illinois. Suffice it to say, that in the trial court, it was not contended by defendant that the accident occurred beyond the territorial limits of the state of Illinois, and that the case was tried on the theory that the accident occurred in Illinois. Furthermore, the record

shows that the accident occurred on Milwaukee road between Wheeling and Half-Day, Illinois.

It is also contended that the error in the admission of X-ray photographs, counsel arguing that the witness who testified as to these pictures was not sufficiently qualified, and that they were not properly identified. Dr. Edwin B. Fowler testified that he had taken thousands of X-rays; that he was present when the pictures in question were taken under his direction by a machine in good operating condition, and after describing the position in which plaintiff was placed when the pictures were taken, he stated that each of the pictures correctly portrayed the internal bony structure of the plaintiff. There was no error in admitting the pictures.

(Stevens v. I. C. Ry. Co., 304 Ill. 370; Wicks v. Chicago & North Branch Ry. Co., 319 Id. 346.)

Other errors are assigned, but since the points have not been argued they will be deemed to have been waived and will not be considered. (People v. Cobbs, 343 Ill. 79, 82; Harvesting Co. v. Industrial Board, 292 Id. 469, 492.)

Finding no reversible error the judgment is affirmed.

AFFIRMED.

Scanlan and Oridley, JJ., concur.

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35810

WM. F. GREENHILL and
HAROLD GREENHILL, doing
business as WM. F. GREENHILL
& SON, (plaintiffs),
Appellees,

v.

ARTHUR R. PETERSON and
EDWARD FLAHERTY, (defendants),
Appellants.

1247
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 618¹

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Action was brought by plaintiffs against defendants to recover a balance due for goods manufactured and sold to defendants. Tried before a jury and a verdict and judgment in favor of plaintiffs for \$500, from which the defendants appealed.

The amended statement of claim substantially sets forth that the defendants were indebted to plaintiffs for 100 coffee grinders manufactured and sold to defendants pursuant to a verbal agreement of February 1, 1928, and confirmed February 8, 1928, and as per agreements on subsequent dates, and sets forth the dates of the furnishing of additional items with the amounts claimed. The charges total \$1930.85 against which defendants were given a credit of \$1287.30, leaving a balance due of \$643.49. It was also alleged that completion of the 100 grinders was not made until September 1, 1928, because of changes and delays on the part of the defendants.

Each of the defendants filed an amended affidavit of merits. Flaherty's affidavit of merits denied the indebtedness and that the debt resulted from a verbal agreement and averred that he knew only of the agreement of February 8, 1928, and that he had complied with all of its provisions; that plaintiffs refused to

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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Figure 2 shows a sample of the data collected for the 1998 survey.

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The Specialized Vehicle and Light Administration will be made

THE UNIVERSITY OF CHICAGO PRESS

But he says the company's letter is not bad. He says it's just not

we have only at the moment of February 2, 1917, and that is not

perform their contract and were seeking to charge defendants with what was not called for by the contract, and denied the completion of the grinders was not made because of changes and delays on the part of defendants. Peterson's affidavit of merits denied he entered into the verbal agreement as alleged in the amended statement of claim.

The defendant Flaherty also filed a statement of claim on set-off in which he alleged that he, doing business as Mil-Ryte Company, not incorporated, on or about February 8, 1928, contracted with plaintiffs for the manufacture of 100 grinders to be finished complete and in accordance with the models submitted to them at the time of the making of said contract for \$1003.35, and to be delivered within three or four weeks; that as a part of said contract plaintiffs agreed to obtain special tools for the making of said grinders for which he agreed to pay plaintiffs \$173.25; that Mil-Ryte Corporation upon its incorporation adopted and ratified said contract; that February 8, 1928, he paid plaintiffs the full contract price of said grinders and tools, but plaintiffs failed to deliver more than 40 of said grinders, of which only 17 were finished complete and in accordance with the models submitted to plaintiffs; that he notified plaintiffs the grinders did not comply with the terms of the contract and that he would not accept them and claimed \$1366.01 was due him from plaintiffs.

Plaintiffs' affidavit of merits to the set-off alleged the making of the contract with the defendants and its performance, and denied the remaining allegations.

The plaintiffs' evidence discloses that in January, 1928, the defendants called at plaintiffs' plant with parts of a coffee grinder and inquired if plaintiffs could manufacture an electric coffee grinder and were told that if defendants had a

perform their contract and were seeking to change defendant with
what was not called for by the contract, and caused the completion
of the contract was not made because of changes and delays on the
part of defendant. Defendant's affidavit of defense states on motion
into the verbal agreement as alleged in the amended statement of
claim.

The defendant likewise also filed a statement of claim
on behalf of which he alleged that he, being business as his type
company, was incorporated, as at about February 8, 1928, entered
with plaintiff for the manufacture of 100 windows to be finished
complete and in accordance with the model submitted to him at
the time of the making of said contract for 1928, and to be
delivered within three or four weeks; that as a part of said con-
tract plaintiff agreed to obtain special tools for the making of
said windows for which he agreed to pay plaintiff \$175.00; that
plaintiff's Corporation upon the incorporation signed and sealed
said contract that February 8, 1928, as said plaintiff's filed as
contract for the making of said windows and seals, but plaintiff failed to
deliver more than 40 of said windows, of which only 17 were
finished complete and in accordance with the model submitted to
plaintiff; that he notified plaintiff the previous day and enough
with the terms of the contract and that he could not comply then and
altered \$125.00 was due him from plaintiff.

Plaintiff, although it makes no claim on the part of alleged
the making of the contract with the defendant and the performance,
and being the remaining windows.
The plaintiff's evidence shows that in January,
1928, the defendant called on plaintiff, and that upon the
other window and finished it plaintiff could manufacture as

sample or blue print plaintiffs would go into the matter. No sample or model was furnished but plaintiffs were told what defendants desired. As a result, on February 8, 1938, the parties entered into an agreement by which plaintiffs agreed to manufacture 100 coffee grinders finished complete and assembled with motor, plaintiffs agreeing to furnish special tools for the making of said grinders for the total sum of \$1176.60. It was also agreed plaintiffs were to procure additional parts for which an additional charge was to be made. Work was begun shortly thereafter and within three or four days the defendants told plaintiffs they wanted to do a little experimenting to determine exactly how the machine was to be constructed; about April 1, 1938, plaintiffs completed a model which defendants took away to show prospective customers and to experiment further, instructing plaintiffs to withhold further construction until notified to proceed; that in July defendants stated the experiment had proven successful and directed plaintiffs to make certain changes suggested by them and proceed to manufacture the grinders. The motor originally submitted to plaintiffs was changed by defendants who were told by plaintiffs that the changed motors were not strong enough to do the work; other changes suggested by defendants were also made; that these changes necessitated the use of additional material not contemplated originally, which defendants requested plaintiffs to obtain and agreed to pay for same. One hundred coffee grinders were thereafter manufactured exactly as desired by defendants, and during the months of August and September defendants took from plaintiffs' plant 40 of the grinders, the remaining 60 were completed and placed in storage.

The defendants' version is that the defendants met plaintiffs and their superintendent and showed them the coffee

grinder and inquired if they would be able to make it and were told that they would make it run with the precision of an Elgin watch; that later they showed them the model and ground six pounds of coffee in their presence and were told they could make it without a blue print; that after defendants had gotten 40 of the grinders Flaherty discovered that one would grind medium to coarse, another fine, and another would grind extremely coarse; that he thereupon called one of the plaintiffs and told him that Peterson was so incensed at the rotten job he wanted to sue plaintiffs; that he kicked like blazes at the extras and finally Greenhill gave him a credit of \$110.76.

Arthur R. Peterson testified that he and Flaherty met plaintiffs' superintendent who stated he could make the coffee mill; that they (defendants) had a complete model without a top and ground hundreds of pounds of coffee with it in the presence of Greenhill who said he would make a perfect model of the sample they had furnished. He further testified that plenty of mills that he saw ground defectively.

Carl Backstrom, a tool and dye maker, testified that he worked on Flaherty's coffee grinder; that the real trouble was the holes in the housing were too far apart; that they were not equal and were grinding lopsided.

It is claimed the court erred in admitting in evidence certain invoices, copies of the originals, instead of the originals, counsel arguing that these copies should not have been admitted. In this contention we do not concur. An examination of the record discloses that no objection to these invoices was made because they were copies, and under the circumstances it was proper to admit the copies in evidence.

It is also contended the court erred in instructing the

grinder and inquired if they would be able to make it and were told that they would make it ten with the provision of an engine watch; that later they showed them the model and ground six pounds of coffee in their presence and were told they could make it without a fine print; that after statements had been made to the grinders Wainwright discovered that one would grind medium to coarse, another fine, and another would grind extremely coarse; that he thereupon called one of the plainists and told him that Peterson was as licensed as the others (as he wanted to see plainists); that he looked like a plainist at the center and (telling Wainwright) gave him a credit of \$110.75.

Arthur R. Peterson testified that he and Wainwright met plainists' representatives who stated he could make the coffee mill in a day (statements) and a complete model within a day and ground hundreds of pounds of coffee with it in the presence of Greenhill who said he would make a perfect model of the sample they had furnished. He further testified that Greenhill said that he saw ground coffee.

Carl Peterson, a son of Arthur, testified that he worked on Wainwright's coffee grinder; that the real trouble was the holes in the housing were too tight; that they were not equal and were grinding ineffectively.

It is claimed the court erred in admitting in evidence certain invoices, copies of the originals, instead of the originals. It is claimed that these copies should not have been admitted. In this contention we do not concur. An examination of the records disclosed that no objection to these invoices was made because they were copies, and under the circumstances it was proper to admit the copies in evidence.

jury and in refusing to instruct as requested by defendants, and in his brief and argument counsel for defendants complains that the court gave the jury three instructions tendered by plaintiffs and refused four instructions tendered by defendants. The instructions are not set out in defendants' brief and the point is not properly raised. (General Platers' Supply Co. v. L'Honniedieu & Fong Co., 228 Ill. App. 201, 206; Spencer v. Chicago & N. W. Ry. Co., 249 Ill. App. 463; Roy Iverson Co. v. United States Lloyds, Inc., 251 Ill. App. 150; Gory v. Woodmen Accident Co., 253 Ill. App. 30, 35.) We have, however, considered defendants' contention and are of the opinion the court did not err in instructing the jury and in refusing the instructions tendered by the defendants.

Defendants also argue that the verdict is a compromise; that if the defendants are liable, plaintiffs should have recovered the full amount of the claim. This contention also is without merit. While plaintiffs might have complained of this had they seen fit to do so, defendants cannot successfully do so. (Raid v. Houghton, 20 Ill. App. 48, 49, 50; Hedenberg v. Graham, 68 Ill. App. 140, 144, 145; People's Nat. Bank of Monmouth v. Fernald, 252 Ill. App. 5, 9; Heyman v. Heyman, 210 Ill. 524, 540.)

The remaining contentions of defendants' counsel are that the judgment is contrary to law and against the weight of the evidence. Counsel argues that the evidence indicates the corporate liability of the Mil-Ryte corporation and that there was no evidence tending to show any liability on the part of the defendant Peterson. This contention is untenable. The record clearly discloses that the defendants Flaherty and Peterson requested plaintiffs to manufacture the coffee grinders and there is no testimony in the record tending to show any liability on the part of the Mil-Ryte corporation.

Furthermore, no such defense was made by either in the trial court.

For the reasons stated the judgment is affirmed.

Scanlan and Gridley, JJ., concur.

AFFIRMED.

35843

KATHERINE CLARK LITTLEFIELD,
(plaintiff),
Plaintiff in Error,
v.
WILLIAM W. ARMSTRONG,
(defendant),
Defendant in Error.

125
ERROR TO CIRCUIT
COURT, COOK COUNTY.

267 I.A. 619¹

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

The plaintiff sued William W. Armstrong, an alleged agent of plaintiff, to recover the difference between the amount actually paid by the alleged agent for certain stocks purchased on behalf of plaintiff, and the amount given by plaintiff to defendant to effect said purchase. The case was tried before the court with a jury and at the conclusion of the plaintiff's evidence the court, on motion of the defendant, directed a verdict for defendant. From the judgment entered upon the verdict the plaintiff has sued out the present writ of error.

The amended declaration consisted of the common counts, and a special count in which in substance it is alleged that April 8, 1930, defendant acted in an advisory capacity pertaining to stocks and bonds to be bought by the plaintiff; that the defendant informed plaintiff he had an opportunity to get 25 shares of Elevator Supplies Co., Inc., at \$250 a share; that subsequently, after defendant had obtained information that said stock could be obtained for \$135 a share, defendant falsely and fraudulently represented to plaintiff that he could buy the same for her for \$250 a share; that she, believing it to be true that defendant could obtain said stock for \$250 a share and relying upon the false and

WILLIAM W. HARRINGTON,
Plaintiff in Error,
vs.
JAMES HARRINGTON,
Defendant in Error.

COURT OF APPEALS
STATE OF NEW YORK

1919 A. 132

MR. HARRINGTON JAMES HARRINGTON WILLIAM W. HARRINGTON THE JAMES HARRINGTON

The plaintiff and William W. Harrington, an attorney at
law, to recover the difference between the amount actually
paid by the plaintiff agent for certain shares purchased on behalf of
plaintiff, and the amount given by plaintiff to defendant to effect
said purchase. The case was tried before the court with a jury
and at the conclusion of the plaintiff's evidence the court, on
motion of the defendant, directed a verdict for defendant. From
the judgment entered upon the verdict the plaintiff has now appealed.
The present is of error.

The evidence before the court consisted of the common recollection
and a special agent in which in substance it is alleged that in
1910, defendant acted in an advisory capacity pertaining to
shares and bonds to be bought by the plaintiff; that the defendant
advised plaintiff to buy an additional 100 shares of
Harrington Company 100 shares, at \$100 a share; that subsequently
after the shares had been purchased defendant advised plaintiff to

obtain for 1910 a share, defendant having and immediately
arranged for plaintiff to buy the same for her for
100 shares; that when, believing it to be true that defendant could

fraudulent representations of the defendant that he could purchase said stock for \$250 a share for her she did actually deliver to defendant bonds of sufficient value, together with a negotiable check for the balance to pay for 25 shares of said stock at \$250 a share, whereby plaintiff sustained a loss of \$65 a share upon each of said 25 shares of stock, totaling \$1625.

The plaintiff contends that the trial court erred in directing a verdict for defendant at the close of the plaintiff's evidence. A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the testimony so demurred to, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff (McCune v. Reynolds, 288 Ill. 183, 190; Waldren Express Co. v. Krug, 291 id. 474, 475), and the maker of the motion admits the truth of all inferences which may be fairly and rationally drawn from it. (Offutt v. World's Columbian Exposition, 175 Ill. 472, 474; C. & N. W. Ry. Co. v. Lunleavy, 129 id. 132.) If there is any evidence from the record, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all the material averments of the declaration have been proved, then the cause should be submitted to the jury. (Libby, McNeill & Libby v. Cook, 222 Ill. 206; McFarlane v. Chicago City Ry. Co., 288 id. 476, 478; Waldren Express Co. v. Krug, *supra*.)

The evidence for the plaintiff tends to prove the following facts: About March 25, 1930, plaintiff conferred with defendant concerning the purchase of 25 shares of Elevator Supplies Co., Inc., at which he informed her that he knew some third person who wanted to dispose of the stock. April 7, 1930, he called plaintiff over the telephone and told her he would buy the stock for her; that he would not be making any profit from plaintiff on the purchase of the stock

transmission representations of the defendant that he could purchase
 said stock for \$200 a share for the defendant's delivery to
 defendant bonds of sufficient value, together with a negotiable
 check for the balance to pay for 25 shares of said stock at \$200
 a share, which plaintiff received a form of the check from the
 of said 25 shares of stock, totaling \$5,000.

The plaintiff contends that the trial court erred in
 granting a verdict for defendant as the claim of the plaintiff's
 witness. A motion to instruct the jury to find for the defendant
 is in the nature of a demurrer to the evidence, and the plaintiff
 admitted the defendant's evidence. The plaintiff's evidence
 does not show that the defendant is guilty of the plaintiff's charge.
The plaintiff's evidence is that the defendant is guilty of the plaintiff's charge.
 which may be fairly and reasonably shown from the evidence.
The plaintiff's evidence is that the defendant is guilty of the plaintiff's charge.
 It shows in any evidence from the

plaintiff. It is shown from the evidence that the defendant is guilty of the plaintiff's charge.
 as the fact of the law, that all the material elements of the
 transaction have been proved, then the case should be submitted to
 the jury. (The plaintiff's evidence is that the defendant is guilty of the plaintiff's charge.)
The plaintiff's evidence is that the defendant is guilty of the plaintiff's charge.

The evidence of the plaintiff tends to prove the following
 facts: That the defendant is guilty of the plaintiff's charge.
 showing the purchase of 25 shares of defendant's stock for \$200 a share.
 which he received has been shown. The plaintiff's evidence is that the defendant is guilty of the plaintiff's charge.
 of the stock. The plaintiff's evidence is that the defendant is guilty of the plaintiff's charge.
 defendant and told her he would buy the stock for her; that he would

for her. The following day he called again and urged her to buy the stock quickly because the owner had to dispose of it immediately; that there was not time to waste in getting the stock because this man had to dispose of it immediately for some ready cash; that he would be able to get the stock for \$250 a share and that he would buy at \$250 a share, which was very cheap. After this conversation over the telephone defendant called for plaintiff in his automobile and drove her to her safety deposit vault from which she obtained certain bonds which defendant was to sell and then purchase the stock with the proceeds. The bonds were sold and the proceeds applied toward the payment of the stock. Plaintiff relied upon the defendant, her agent. Defendant purchased the stock in question for \$185 a share but received from plaintiff \$250 a share.

In our judgment it is idle for the defendant to argue that the plaintiff's evidence did not make a prima facie case. We are at a loss to understand upon what theory the court instructed the jury to find for the defendant. This record, in our opinion, made out a prima facie case of agency, and once the relationship of agency is established, the duties and responsibilities incident thereto attach. An agent cannot take advantage of his position to make a profit for himself, but all profit and advantages gained in the transaction belong to the principal. (Salisbury v. Ware, 183 Ill. 506, 511.) The relationship of principal and agent is one of trust and confidence, and where such confidence is reposed and such relation exists it must be faithfully acted upon and preserved from any intermixture of imposition. (Perry v. Angel, 296 Ill. 549, 554; Conant v. Biserborough, 139 id. 383, 391.)

For the reasons indicated the judgment of the Circuit court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.
Scanlan and Gridley, JJ., concur.

35881

JULIUS ESTRIK,
(plaintiff),
Defendant in Error,

v.

CHARLES JANOVSKY,
(defendant),
Plaintiff in Error.

1267
ERROR TO CIRCUIT COURT,
COOK COUNTY.

267 I.A. 619²

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action for assault and battery against Charles Janovsky; an ex parte jury trial resulted in a verdict and judgment in favor of plaintiff for \$500. After the term at which the judgment was entered had expired, defendant filed a petition in the nature of a writ of error coram nobis under section 89 of the Practice Act, Cahill's Stats. ch. 110, par. 89. Plaintiff filed a demurrer which was sustained, and the court on July 3, 1930, entered the following order:

"This cause coming on to be heard upon the plaintiff's demurrer to the defendant's motion to vacate the judgment order heretofore entered herein; after arguments of counsel and due deliberation by the Court said demurrer is sustained, to which the defendant excepts."

To reverse this order defendant sued out the present writ of error. ^{The record} discloses that suit was commenced June 14, 1928; that July 14, 1928, the appearance of the defendant was filed, and on July 17, 1928, defendant filed a demurrer to the plaintiff's declaration; November 27, 1928, notice was served upon defendant's attorney that plaintiff's attorney would ask the court to set the demurrer for hearing; December 15, 1928, the demurrer was overruled and the defendant ordered to plead within ten days; February 13, 1930, defendant was defaulted for want of a plea, and on February 27, 1930, after an

1934

LEWIS ELLIS
(Plaintiff)

Defendant in Error

v.

GEORGE ELLIS
(Defendant)

Plaintiff in Error

WITNESSES TO DEEDS COURT

DOCK NO. 1

1934

IT IS HEREBY ORDERED THAT THE COURT SHALL HAVE THE DEEDS OF THE COURT

Plaintiff brought an action for recovery and delivery

against Charles J. Lewis, as the party, and the court was divided in a
verdict and judgment in favor of plaintiff on July 1, 1934. After the

case at which the judgment was entered was argued, the court

filed a decision in the matter of a writ of error returnable

under section 26 of the Practice Act, Chapter 10, Sec. 100

and 50. Plaintiff filed a demurrer which was sustained, and

the court on this 12th day, entered the following order:

"This court having no jurisdiction of the matter, the plaintiff's
petition for the writ of error is hereby denied, and the court
will enter judgment in favor of the defendant, and the
costs of the writ of error shall be paid by the plaintiff."

It is ordered that the plaintiff pay out the costs of the

of error. The record of the case was returned to the court on July 1, 1934, and on July 1, 1934, the court

filed a decision in the matter of a writ of error returnable

under section 26 of the Practice Act, Chapter 10, Sec. 100

and 50. Plaintiff filed a demurrer which was sustained, and

the court on this 12th day, entered the following order:

"This court having no jurisdiction of the matter, the plaintiff's
petition for the writ of error is hereby denied, and the court
will enter judgment in favor of the defendant, and the costs of the writ of error shall be paid by the plaintiff."

It is ordered that the plaintiff pay out the costs of the

of error. The record of the case was returned to the court on July 1, 1934, and on July 1, 1934, the court

ex parte jury trial, the verdict and judgment for plaintiff was entered. The verified petition of defendant under section 89 of the Practice Act, stated substantially that he filed his appearance and a demurrer which was overruled; that he was given ten days time to plead; that he did not file a plea, and on February 13, 1930, he was defaulted for want of an answer, and on February 27, 1930, without notice to him or his attorney, the judgment in question was entered.

From our examination of the record we are of the opinion that the writ of error must be dismissed because it is not taken from any final order in the coram nobis proceeding, which is to be considered as a new suit. (Mitchell v. King, 137 Ill. 452, 459; Domitaki v. American Linseed Co., 221 id. 161, 164. It does not appear from the common law record that the court entered any final order. The only order entered by the court was the sustaining of the demurrer. It was not a final order. The court did not dismiss defendant's petition. (The People v. Crooks, 326 Ill. 266, 280, 281; Chapman v. Worth American Ins. Co., 292 id. 179, 189.)

Possibly the reason that the writ of error was sued out was that the bill of exceptions signed by the trial judge contained the statement that the court having heard the arguments of counsel for the respective parties, sustained the demurrer and overruled and denied said petition and refused to set aside said default and said judgment. But we, as an appellate tribunal, can not look to the bill of exceptions to determine the extent or effect of a judgment order. That must be determined solely from the judgment order as contained in the common law record or record proper, which, in a suit at law "consists of the process * * the declaration, pleas, demurrer, if there is any; also any judgment upon demurrer, or other judgment, interlocutory or final." (Van Cott v. Brague, 5 Ill. App. 90, 101.) In People v. Kuhn, 291 Ill. 154, 162, it is said:

"It is the office of a bill of exceptions to bring before the court matters outside of the record proper, and matters of record can not be shown by such a bill. * * * The record imports absolute verity and is the sole, conclusive and unimpeachable evidence of the proceedings in the lower court. * * * The general rule recognized by courts is, that in the event of a conflict between the bill of exceptions and the record proper the record will control as to all matters shown and properly appearing in that record, and as to matters properly included in the bill of exceptions it will prevail over matters shown in the record proper."

For the reasons indicated the present writ of error is dismissed.

WRIT OF ERROR DISMISSED.

Scanlan and Gridley, JJ., concur.

35863

127 A

CHRISTOPHER HEMRICK,
(plaintiff),
Appellant,

v.

THOMAS J. PURCELL,
(defendant),
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

267 I.A. 619³

MR. PRESIDING JUSTICE KEENER DELIVERED THE OPINION OF THE COURT.

Christopher Hemrick, plaintiff, sued Thomas J. Purcell, defendant, in case. A trial before a jury resulted in a verdict of not guilty. Judgment was entered on the verdict and the plaintiff has appealed.

The cause proceeded to trial upon two counts of the amended declaration. The first count charged that on January 1, 1931, defendant owned, possessed and was operating an automobile in an easterly direction on Grand avenue near the intersection thereof with Keeler avenue, both public highways in Chicago, Illinois; that plaintiff was upon said Grand avenue east of the intersection thereof with Keeler avenue; that it was the duty of defendant to exercise ordinary care and caution in the operation and control of said automobile so as not to cause injury to plaintiff; that defendant carelessly, negligently and improperly operated said automobile and as a result it ran into and against defendant, etc. The second count charged, inter alia, that it was the duty of defendant to operate and drive said automobile at a safe and reasonable rate of speed, having regard to the traffic and the use of the way so as not to endanger the life, limb and safety of the plaintiff; that defendant failed to observe his

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Q10 A1762

DOI: 10.1002/for

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duties in that behalf and drove said automobile at a high, dangerous and unreasonable rate of speed, without regard to the traffic and the use of the way or the character of the locality, in consequence of which said automobile of defendant ran into and violently struck plaintiff, etc. Each count alleged that plaintiff was at all times in the exercise of ordinary care for his safety. The defendant pleaded the general issue.

The record discloses that on January 1, 1931, between 3:30 and 4:00 a. m., two automobiles collided near Grand and Keeler avenues, Chicago, Illinois. The police were called to the scene of the accident. Plaintiff was one of the police officers who went on the patrol wagon to investigate the accident. The wagon was parked on the south side of Grand avenue almost directly across the street from the scene of the accident. Grand avenue is 45 feet wide and runs in a northwesterly direction. Keeler avenue is a north and south street. There are double street car tracks in the center of Grand avenue occupying a space of 15 feet. The distance from the south curb to the south or outer rail of the eastbound track is about 14 feet. While engaged in taking the names of witnesses in front of the headlights of an automobile, parked on the south side of Grand avenue, plaintiff stooped with his buttocks extending in a direction somewhat northwest into Grand avenue, and was struck by defendant, who was traveling in his automobile east on the south side of Grand avenue. It also appears that defendant gave no warning and plaintiff did not see the defendant's automobile and knew nothing of its approach until he was struck by it. Defendant testified he was driving east on Grand avenue almost in the car rails - perhaps 6 inches off the rail, on the eastbound track; that when he got to Keeler avenue he saw that there had been some sort of an accident on the north side of Grand avenue east of Keeler avenue;

driver in that behalf and drove said automobile at a high, dangerous

and unreasonable rate of speed, without regard to the traffic and
the use of the way or the character of the locality, in consequence
of which said automobile of defendant ran into and violently struck
plaintiff, etc. Each count alleged that plaintiff was at all times
in the exercise of ordinary care for his safety. The defendant

pleaded the general issue.

The record discloses that on January 1, 1931, between
3:10 and 4:00 a. m., two automobiles collided near Grand and Madison
avenues, Chicago, Illinois. The police were called to the scene
of the accident. Plaintiff was one of the police officers who went
on the night before to investigate the accident. The scene was
located on the south side of Grand avenue almost directly across
the street from the scene of the accident. Grand avenue is 15 feet
wide and runs in a northeasterly direction. Madison avenue is a
narrow and noisy street. There are several stores and taverns in the
center of Grand avenue occupying a space of 15 feet. The defendant
took the route only to his work or other part of the city
about 15 miles to the north. While passing in either the course of his
route he passed the building of the automobile, which he saw
about 15 miles to the north, plaintiff stopped with his automobile
standing in a position somewhat westward from Grand avenue, and
was struck by defendant, who was traveling in his automobile east
on the north side of Grand avenue. It also appears that defendant
was an operator and plaintiff did not see the defendant's automobile
and that plaintiff at the accident was not struck by the defendant's
automobile as was alleged with the defendant's claim in the first
page of the record and the bill. In the defendant's bill it is
alleged that the defendant was not struck by the defendant's automobile

that he slowed down to 15 miles an hour; that he saw the wreck and the wrecking car of the Surface Lines; that there was nothing on the eastbound tracks; that the eastbound track was clear and he diverted his attention to the accident; that he saw nothing until he heard a thud on the side of his automobile and saw plaintiff lying on his back five feet from the rear wheel of his automobile.

A larger number of errors are assigned. In the view we take of the instant case the only question necessary to be now considered is, did the court err in instructing the jury. The court, at defendant's request, gave 13 instructions. Complaint is made of instructions numbered 13, 14, 15 and 16, which read as follows:

"13. The Court instructs the jury that if you find from the evidence and under the instructions of the Court that the plaintiff saw the automobile with which he came in contact approaching, or by the exercise of ordinary care for his own safety could have seen it approaching, and if you further find from the evidence the plaintiff could have avoided the accident in question by the exercise of ordinary care for his own safety, and that he failed to do so, and that by reason of his failure to exercise ordinary care he sustained injuries, then he cannot recover.

"14. You are instructed that the defendant was not required to exercise the highest degree of care to avoid the collision with the plaintiff, but he was required only to exercise ordinary care. Ordinary care means such care as is ordinarily exercised by a reasonably prudent person under such circumstances as surrounded the defendant at and immediately before the time of the accident; and if you believe from a preponderance of the evidence in this case under the instructions of the Court that as the defendant drove his automobile east on Grand avenue and approached the point of collision, that he was operating his automobile with ordinary care, then the plaintiff cannot recover.

"15. You are instructed that the driver of an automobile is under no greater obligation to look out for and protect a pedestrian in the street at a place other than a crossing, than a pedestrian is under to look out for and protect himself. It is the duty of the pedestrian under such circumstances to keep on the lookout for automobiles approaching upon the proper and lawful side of the street, and to exercise care to avoid any automobile so approaching. If you believe from the evidence that the accident to the plaintiff occurred at a place in the street other than a crossing and that the plaintiff in this case failed in either of these regards, and that such failure contributed to the accident, you must find the defendant not guilty.

"16. The court instructs you that you are not warranted in comparing the negligence of the plaintiff and the defendant, if any, to determine which was guilty of the greater degree of negligence; but if you find from the evidence, under the instructions of the Court, that the plaintiff was guilty of any want of ordinary care which caused or proximately contributed to cause the damages complained of, then you should find the defendant not guilty."

After a careful examination of all the evidence we are of the opinion it was essential the jury be accurately instructed on the duties of the defendant as he approached Grand and Keeler avenues. Instructions should state the law applicable to the particular facts which the evidence in the case tends to prove. The instructions as given to the jury did not take into account the unusual conditions existing at the time of the accident, which are factors that must be taken into consideration. In the instant case plaintiff was a police officer and in the line of duty engaged in investigating an automobile accident, absorbed in his task, and when defendant arrived at Grand and Keeler avenues he knew of the extraordinary conditions prevailing. In Chaney v. Moore, 101 W. Va. 621, the court said:

"The operator of an automobile on the public road is bound to observe extraordinary conditions existing along the way, and when warned by a sign and otherwise that workmen are engaged ahead in repairing the road, he must sound his horn and approach and attempt to pass the place where the workmen are so employed at such rate of speed and at all times have his car under such control as to avoid injuring a workman so engaged, if he would avoid liability for injuries inflicted by his failure to observe such due care."

See also Huddy on Automobiles, 7th Ed. 409, and Carneghi v. Gerlach, 208 Ill. App. 340.

Complaint is also made that the court gave too many instructions at the request of defendant which ended with the words, "cannot recover," "find the defendant not guilty," or "the verdict of the jury should be not guilty." Six of the instructions tendered by the defendant contained the words complained of, one of the six containing both phrases. The giving of an unnecessary number of

instructions has been disapproved. (Jaubach v. Drake Hotel Co.,
243 Ill. App. 298, 304, and cases cited.)

For the reasons stated the judgment of the trial court
is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

beginning of the year 1904 (January 1st to December 31st)

and the year 1905 (January 1st to December 31st)

and the year 1906 (January 1st to December 31st)

and the year 1907 (January 1st to December 31st)

and the year 1908 (January 1st to December 31st)

and the year 1909 (January 1st to December 31st)

and the year 1910 (January 1st to December 31st)

and the year 1911 (January 1st to December 31st)

and the year 1912 (January 1st to December 31st)

and the year 1913 (January 1st to December 31st)

and the year 1914 (January 1st to December 31st)

and the year 1915 (January 1st to December 31st)

and the year 1916 (January 1st to December 31st)

and the year 1917 (January 1st to December 31st)

and the year 1918 (January 1st to December 31st)

and the year 1919 (January 1st to December 31st)

and the year 1920 (January 1st to December 31st)

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and the year 1925 (January 1st to December 31st)

and the year 1926 (January 1st to December 31st)

and the year 1927 (January 1st to December 31st)

and the year 1928 (January 1st to December 31st)

and the year 1929 (January 1st to December 31st)

and the year 1930 (January 1st to December 31st)

and the year 1931 (January 1st to December 31st)

35867

EDWARD C. KESLER,
(Plaintiff) Appellee,
vs.
FRANK E. DINGLE,
(Defendant) Appellant.

128
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY

267 I.A. 619

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit brought by plaintiff, Edward C. Kesler, against Frank E. Dingle for money had and received. Plaintiff obtained a judgment for \$6000 which the defendant seeks to have reversed.

Plaintiff filed the common counts with an affidavit of claim that his demand is for money had and received to and for the use of plaintiff for services, and that there is due plaintiff from defendant, after allowing to him all just credits, deductions and set off's \$6000. He also filed a bill of particulars setting forth, inter alia, that April 1, 1926, the Kankakee Building Corporation executed and recorded a trust deed to the City State Bank of Chicago as trustee, to secure a bond issue of \$425,000, which bonds were sold to the public; that the Kankakee Building Corporation defaulted in the payment of interest; that October 21, 1927, a Bondholders' Protective Committee was created and a great number of said bondholders deposited their bonds with the depository named in the Bondholders' Deposit Agreement creating said Bondholders' Protective Committee; that plaintiff is an attorney and during 1928, the City State Bank and the members of said Bondholders' Protective Committee, consulted with plaintiff regarding the advisability of filing a foreclosure bill to foreclose the Trust Deed securing the bond issue of \$425,000; that December 1, 1926, the Kankakee Building Corporation executed and delivered an indemnity bond, with the Royal Indemnity Company as surety, binding themselves unto the City State Bank, as trustee, for

EDWARD G. KESTER,
(Plaintiff) vs.
JAMES E. BINGIE,
(Defendant)

267 I.A. 619

ALL RIGHTS RESERVED BY THE AUTHOR.

This was an action in rem brought by plaintiff.

Edward G. Kester, against James E. Bingie for money had and received.

Plaintiff obtained a judgment for \$1000 with the following costs.

to have reversed.

Plaintiff filed the common count with an affidavit of claim.

that his demand is for money had and received to and for the use of

plaintiff for services, and that there is due plaintiff from de-

endant, after allowing to him all just credits, deductions and set

offs \$1000. He also filed a bill of particulars setting forth, inter

alia, that April 1, 1926, the Kankakee Building Corporation executed

and recorded a trust deed to the City State Bank of Chicago as

trustee, to secure a bond issue of \$425,000, which bonds were sold

to the public; that the Kankakee Building Corporation defaulted in

the payment of interest; that October 21, 1927, a bondholders' pro-

jective committee was elected and a great number of said bondholders

deposited their bonds with the depository named in the bondholders'

Deposit Agreement creating said bondholders' Protective Committee;

that plaintiff is an attorney and during 1928, the City State Bank

and the members of said bondholders' Protective Committee, consulted

with plaintiff regarding the advisability of filing a foreclosure

bill to foreclose the trust deed securing the bond issue of \$425,000;

that December 1, 1928, the Kankakee Building Corporation executed

and delivered an indenture bond with the Royal Indemnity Company as

the benefit of the bondholders, in the sum of \$125,000, to erect and complete the building then in process of erection on or about July 1, 1927; that said building was not completed; that City State Bank as trustee and as a member of said Bondholders' Committee, consulted plaintiff with regard to the institution of proceedings against said Royal Indemnity Company; that after numerous conferences plaintiff was retained by said City State Bank as trustee to file a bill to foreclose the trust deed and to commence a suit against said Royal Indemnity Company upon said indemnifying bond, and was given permission to employ defendant as associate counsel; that thereupon defendant, with plaintiff's aid, prepared a bill in foreclosure and tendered it to plaintiff for his approval; that after plaintiff approved the bill it was filed in the Circuit court of Kankakee county, Illinois, plaintiff and defendant appearing thereon as solicitors for complainant; that all the services rendered in said cause, except the argument on objections to the Master's report and the drafting of the decree, were rendered by plaintiff; that plaintiff and defendant also commenced a suit in the Circuit court of Cook county, Illinois, on behalf of the City State Bank as trustee against the Royal Indemnity Company and that all the services rendered in that cause were rendered by plaintiff and defendant; that some time in 1930 plaintiff called at defendant's office and was informed that the objections to the Master's report had been overruled, and that defendant was preparing a decree; that thereafter defendant caused the decree to be entered and procured the allowance of \$5000 as solicitor's fees for complainant in said cause; that the litigation against the Royal Indemnity Company was compromised and settled for \$75,000 and said sum paid; that defendant received \$7000 as fees in said suit and \$5000 as solicitor's fees in the foreclosure suit, making a total of \$12000, of which plaintiff is entitled to one-half.

the benefit of the beneficiaries, to the sum of \$100,000.00, to be paid
and complete the building then in process of erection on an adjacent
July 1, 1907; that said contract was not completed; that said
State Bank as trustee and as a member of said beneficiaries' Com-
mitted, connected plaintiff with regard to the institution of ex-
cessively excessive said Royal Indemnity Company; that after various
conferences plaintiff was retained by said City State Bank as
trustee to file a bill to foreclose the first trust and to commence
a suit against said Royal Indemnity Company upon said indemnifying
bond, and was given permission to employ defendant as associate
counsel; that thereupon defendant, with plaintiff's aid, procured
a bill in foreclosure and attached it to plaintiff for his approval;
that after plaintiff approved the bill it was filed in the Circuit
Court of Jackson County, Illinois, plaintiff and defendant agreed
for them as solicitors for compensation; that all the services
rendered in said case, except the arguments on objections to the
Master's report and the drafting of the decree, were rendered by
plaintiff; that plaintiff and defendant also commenced a suit in
the Circuit Court of Cook County, Illinois, on behalf of the City
State Bank as trustee against the Royal Indemnity Company and that
all the services rendered in that case were rendered by plaintiff
and defendant; that some time in 1910 plaintiff called at defendant's
office and was informed that the objections to the Master's report
had been overruled, and that defendant was preparing a decree; that
thereafter defendant caused the decree to be entered and procured
the allowance of \$2000 as solicitor's fees for compensation in
said case; that the Circuit Court of Cook County, Illinois, entered
was promulgated and settled for \$38,000 and said sum paid; that
defendant received \$2000 as fees in said suit and \$2000 as solicitor's
fees in the foreclosure suit, making a total of \$4000, of

The defendant pleaded non-assumpsit and in his amended affidavit of merits stated he verily believes he has a good defense to the whole and entire demand, and denied he received any money for the use and benefit of plaintiff, and set up, with unnecessary prolixity, what was claimed as special matters of defense.

The trial court, on motion of plaintiff, struck from the files defendant's plea and amended affidavit of merits on the ground that it did not disclose a defense, and being advised defendant had decided to abide by his affidavit of merits, entered judgment against the defendant on plaintiff's affidavit of claim for \$6000. Prior to the entry of the judgment the court overruled defendant's motion to strike plaintiff's declaration and bill of particulars and to enter judgment for defendant.

We shall first discuss defendant's contention that the court erred in overruling his motion. After a careful examination of the authorities we have reached the conclusion there is no merit in this contention. If the plaintiff's bill of particulars and affidavit of claim is true - and it must be so assumed for the purposes of defendant's motion - the contract between the parties was fully executed and one-half of the money received by defendant belonged to plaintiff, and nothing remained to be done to complete the transaction but for defendant to pay it over to plaintiff. It was money defendant had received which in equity and good conscience belonged to plaintiff (Gottschalk v. Smith, 156 Ill. 377, 380), and an action of assumpsit will lie for money had and received wherever, by means of a contract relation, the defendant has obtained possession of money which in justice he ought to refund. (McArthur Bros. Co. v. Whiting, 202 Ill. 527, 529; Arnold v. Dodson, 272 id. 377, 381).

The remaining question for decision is, did the amended affidavit of merits state any legal defense to the plaintiff's cause of action. We cannot and do not approve of defendant's conduct in

The defendant pleaded non-responsibility and in his amended affidavit of denial stated he verily believes he has a good defense in the whole and entire defense, and denied he received any money for the use and benefit of plaintiff, and set up, with unnecessary prolixity, what was claimed as special matters of defense.

The trial court, on motion of plaintiff, set aside the verdict and granted a new trial. The court found that the defendant's plea and amended affidavit of denial on the ground that it did not constitute a defense, was being offered in bad faith and denied in order to delay the trial of the case. The court found that the defendant's plea and amended affidavit of denial were not a defense and that the court should have granted a new trial. The court found that the defendant's plea and amended affidavit of denial were not a defense and that the court should have granted a new trial.

We shall first discuss defendant's contention that the court erred in overruling his motion. After a careful examination of the authorities we have reached the conclusion there is no merit in this contention. If the plaintiff's bill of particulars and affidavit of denial is true - and it must be so assumed for the purpose of the defendant's motion - the contract between the parties was fully executed and one-half of the money received by defendant belonged to plaintiff, and nothing remained to be done to complete the transaction and for defendant to pay it over to plaintiff. It was money which had received value in equity and good conscience belonged to plaintiff (Concepcion v. Baker, 125 Ill. 277, 280), and an action of assumpsit will lie for money had and received wherever, by means of a contract relation, the defendant has obtained possession of money which in justice he ought to refund. (McGuire Bros. Co. v. Wilson, 202 Ill. 207, 209; Arnold v. Torgerson, 275 Ill. 277, 281.) The remaining question for decision is, did the amended affidavit of denial state any legal defense to the plaintiff's cause?

filing such a lengthy affidavit. It was entirely unnecessary. All that was required of him to comply with Section 55 of the Practice Act, Cahill's St., chap. 110, par. 55, was a brief affidavit of merits, specifying the nature of his defense. It is true that where the affidavit is wholly insufficient it may be stricken from the files (Firestone, etc. v. Ginsburg, 285 Ill., 132), but objections to formal defects must be made specially and not by a general motion to strike, as an affidavit of merits is sufficient if it states one good defense. (American Hard Rubber Co. v. Howe, 280 Ill. 431; New York, etc. v. McWilliams 253 Ill. App. 404, 407.)

It is possible that some of the matters set forth in the amended affidavit of merits do not constitute a defense to plaintiff's cause of action and that evidence in support thereof cannot be admitted, but that fact furnishes no reason to hold the affidavit wholly insufficient. There are some matters which do constitute a defense and resort to the trial court may be had upon the admissibility of evidence when it is offered upon the trial.

Section 55 Cahill's St., Ch. 110, par. 55, provides in part: "If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the amount due him from the defendant after allowing to the defendant all his just credits, deductions and set offs, if any, he shall be entitled to judgment, as in case of default, unless the defendant *** shall file with his plea an affidavit stating that he verily believes the defendant has a good defense to said suit upon the merits to the whole *** of the plaintiff's demand." Under this act a defendant must state not only that he verily believes he has a good defense, but also its kind or character, with sufficient particularity to apprise plaintiff of the nature of the defense, and it must necessarily be a legal defense which can be made under the plea he has filed. (Har-

rison v. Rosehill Cemetery Co., 291 Ill. 416, 422.) The affidavit in the instant case, in addition to the averment that defendant did not receive any money for the use and benefit of plaintiff, stated that plaintiff performed no service in connection with either of said two causes of action, and that in fact such services as were rendered by the plaintiff were rendered for and on behalf of the City State Bank of Chicago in its individual and corporate banking capacity. This was the situation in the Harrison v. Rosehill Cemetery Co. case, supra, and in that case the court said (p. 422): "It was incumbent upon the plaintiff to prove that the services were rendered under such circumstances as would raise an implied promise of the defendant to pay for them, and we do not see on what ground it can be said that the affidavit did not specify the nature of the defense and give notice to the plaintiff of the kind and character of defense to be made. The Circuit court erred in striking the affidavit and pleas from the files." See also Means v. Weiner, 243 Ill. App., 556, 561, and Cox v. Aetna Casualty Co., 261 Ill. App., 394.

For the reasons indicated the judgment of the Circuit court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

[illegible]

35878

J. H. BURKHART,
(plaintiff),
Appellee,

v.

DAVID HAROLD CASHION,
IRENE C. CASHION and
EFFIE M. ECKLUND,
(defendants),
Appellants.

129 7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 620¹

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

July 14, 1931, a judgment by confession for \$48.30 was entered on a note executed by defendants and plaintiff, dated December 3, 1930, for \$50, payable to "Personal Loan & Savings Bank," and on the petition of Effie M. Ecklund the judgment was opened and she was given leave to appear and defend, the judgment to stand as security. December 18, 1931, there was a trial before the court without a jury and the judgment was confirmed. To reverse the judgment defendants prosecute this appeal.

The plaintiff has filed in this court his motion to strike from the record the document therein contained designated "Correct Statement of facts" on the ground that it does not comply with section 23 of the Municipal Court Act so as to furnish a record for review authorized by the section. The identical situation prevailed in Fauler v. Bates, 334 Ill. 338, and the court held that where an appeal is taken from a judgment in a fourth-class case in the Municipal Court a certificate of the trial judge to a statement or transcript of the evidence is sufficient as a certificate to a bill of exceptions, notwithstanding it recites that "the foregoing is a correct statement of the facts appearing upon the trial of said cause and of all questions

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THE UNIVERSITY OF CHICAGO PRESS

July 14, 1953. A judgment by contract for \$48.30 was

Entered on a date recorded by the court and retained.

and W. Thompson, with assistance of M. J. J. to hold the and the "Herald"

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to stand as evidence. December 18, 1961. There was a total eclipse

The court without a jury and the judgment was affirmed. To reverse

The Judgment of the Federal Court of Appeal is

the above is not a true statement and is not a true statement.

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Statements of "Labs" on the ground that it was not comply with section

22 of the Municipal Court and he is known to several of the

Authorized by the station. The identification is provided in

George Washington State Bank, Seattle, Wash., 1911-1912, 1913-1914, 1915-1916, 1917-1918, 1919-1920, 1921-1922, 1923-1924, 1925-1926, 1927-1928, 1929-1930, 1931-1932, 1933-1934, 1935-1936, 1937-1938, 1939-1940, 1941-1942, 1943-1944, 1945-1946, 1947-1948, 1949-1950, 1951-1952, 1953-1954, 1955-1956, 1957-1958, 1959-1960, 1961-1962, 1963-1964, 1965-1966, 1967-1968, 1969-1970, 1971-1972, 1973-1974, 1975-1976, 1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 265

It is known from a few reports in a few papers in the United States

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to the evidence at hand and to the fact that the defendant is a person of good character and has no previous record.

of law involved in said case and the decisions of the court upon all such questions of law." In conformity with the ruling of the court in that case, the motion is denied.

The plaintiff has also filed a motion to strike from the record the petition to vacate judgment. That motion is also denied.

The undisputed facts are that the note was executed by the defendants and plaintiff and is payable to the Personal Loan & Savings Bank 36 weeks after its date; by it the signers jointly and severally promise to pay to the Personal Loan & Savings Bank \$50, and each of the signers agree no release of one or more makers, whether by operation of law or by any act of the holder of the note shall release any other maker. The plaintiff did not receive any part of the \$50. He signed the note as surety. The note not being paid upon its maturity plaintiff purchased it from the Personal Loan & Savings Bank.

The defendants seek to reverse the judgment solely on the ground that no action can be maintained on the note because by the purchase of the note by the plaintiff it was extinguished. On the other hand, plaintiff contends that as surety, upon the failure of the defendants to pay the note at its maturity he had the legal right to purchase the note and is entitled thereby to be put in the place of the Personal Loan & Savings Bank (the payee) and to all the means which the payee possessed to enforce payment against the defendants. Defendants in support of their contention cite, among other cases, Gillett et al. v. Sweet, 6 Ill. 475, and Snell v. Davis, 149 Ill. App. 391. We have examined these cases and are of the opinion they are not applicable to the facts in this case. In Gillett et al. v. Sweet, supra, it was held that payment of the note by one of two joint and several promisers operated to extinguish the note. In Snell v. Davis, supra, it was held that the assignment of the note to one of several

of law involved in said case and the decision of the court upon all such questions of law." In conformity with the ruling of the court in that case, the motion is denied.

The plaintiff has also filed a motion to strike from the record the portion of the opinion in which the court stated that the plaintiff's motion was premature. The court in that case stated that the motion was premature because the plaintiff had not yet filed a motion to strike from the record the portion of the opinion in which the court stated that the plaintiff's motion was premature. The court in that case stated that the motion was premature because the plaintiff had not yet filed a motion to strike from the record the portion of the opinion in which the court stated that the plaintiff's motion was premature.

The undersigned has been advised that the note was executed by the defendant and plaintiff and is payable to the plaintiff's order. It is further stated that the note was not cashed until some time after the date of its execution and was not cashed until some time after the date of its execution and was not cashed until some time after the date of its execution.

The defendant seeks to recover the judgment solely on the ground that no action can be maintained on the note because by the provisions of the note by the plaintiff it was established, on the other hand, plaintiff contends that as matter upon the failure of the defendant to pay the note at its maturity he had the legal right to purchase the note and is entitled thereby to be paid in full of the \$1000.00 loan & savings bank (the paper) and so all the money which the paper contained is subject payment against the defendant.

Plaintiff in support of their contention offer several cases.

In Wells v. Wells, 6 Ill. 478, and Wells v. Wells, 149 Ill. 478, 111 Ill. 478, we have decided these cases and are of the opinion they are not applicable to the facts in this case. In Wells v. Wells, 6 Ill. 478, it was held that payment of the note by one of the joint and several obligors operated to extinguish the note. In Wells v. Wells,

makers operated to extinguish it. But in neither of those cases was there a claim that plaintiff was a surety and that he purchased the note.

Under the facts in this case, the argument that the plaintiff can not maintain his action on the note is untenable. Plaintiff was not a principal. He was a surety and he purchased the note on his own behalf, so that he might have the benefit of it, and he has not been paid. No reason has been advanced by defendants why plaintiff could not purchase the note as any one else might do. The money paid by plaintiff to the bank was not paid for the benefit of the defendants, but it was paid to protect plaintiff as surety on the note. By purchasing the note plaintiff was placed in the shoes of the payee of the note and had all the rights which the payee would have in suing upon the note. (Lewis v. Palmer, 23 N. Y. 271, and cases cited; McClure v. Johnson, 65 Pac. 103; Pendergraft et al. v. Phillips, 136 Pac. 1189; Flagg v. Geltmacher, 98 Ill. 293; Allen et al. v. Powell et al., 108 Ill. 584; Howland v. White, 43 Ill. App. 236; Graves v. Reeves, 183 Ill. App. 235.) In McClure v. Johnson, *supra*, the court said (p. 104): "It was held in Farsons v. Bridcock, 2 Vern. 608, that the surety has precisely the same rights that the creditor has, and shall stand in his place, and that it is a right of entire subrogation." In Lewis v. Palmer, *supra*, it was said (p. 275): "It is a well-settled principle, that a surety who pays a debt for his principal, is entitled to be put in the place of the creditor, and to all the means which the creditor possessed to enforce payment against the principal debtor." In Pendergraft et al. v. Phillips, *supra*, a note was signed by a principal and three sureties. One of the sureties paid the note and instituted suit thereon against the principal and the other two sureties. It was held the note was not cancelled and that the action was properly instituted upon the note itself. In Howland v. White,

There was no other person present at the time.

Under the terms of the agreement, the Government shall be responsible for the maintenance and repair of the aircraft and the engine, and the pilot shall be responsible for the operation of the aircraft.

not a principal. He was a merely paid for person and the case on this was

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Washburn to the bank was not paid for the amount of the advance.

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From a Department of the Interior, Bureau of Land Management, Washington, D.C. 20246

1. The first step is to identify the problem. In this case, the problem is that the company is not meeting its sales targets.

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to be put in the place of the creditor, and to all the names which the

1. Personalities of the following groups: a note was signed by a

and would not have recognized the strange woman if she had not been

supra, it was said (p. 242):

"It is urged that the appellee has no cause of action as holder of the notes because the notes were extinguished by the payment of them by her. The proof, we think, is that the appellee did not pay the notes but purchased them, * * * as an indemnity against loss because of her suretyship for J. E. White.

"This she might lawfully do, and keep them alive and not discharged as by payment, though she, as surety, was one of the payors of the notes."

In Flagg v. Geltmacher, supra, the owner of real estate, after executing a trust deed thereon to secure a loan, conveyed the premises to another subject to the encumbrance, which the purchaser assumed and agreed to pay. It was held that the grantee became the principal debtor and the maker of the trust deed and note the surety, and as such the surety had a right to buy the note and mortgage, have the property sold by the trustee under the power contained in the trust deed and become the purchaser at such sale. In Allen et al. v. Powell et al., supra, a corporation appealed from a decree foreclosing a mortgage given by it, and the decree on appeal was affirmed, whereby the surety on the appeal bond became liable to pay the amount of the decree. It was held that the surety had the right to purchase the decree and hold the same for his indemnity; that the decree was not discharged, but according to the intention of the parties will be kept alive for the surety's protection. And the court in discussing the question said (p. 590):

"In such cases the authorities hold the assignees will be protected, although they may be secondarily liable, as sureties or otherwise, for the debt or claim they may buy. It is a mode of buying indemnity against loss, and no policy of the law forbids it. By what was done the mortgagor was not discharged from its indebtedness to the executors of the mortgagees. As has been seen, there was no intention to discharge such indebtedness, and the intention of the parties is always the controlling element in such transactions. It is still owing and undischarged, and the assignment carries with it the same right to collect that the executors of the mortgagee had."

In Graves v. Neeves, supra, the court said: "When the plaintiff was obliged to take up the note, he succeeded to all the rights of the bank, and became the owner of the note, by purchase from the bank."

Furthermore, the defendants engaged that they would pay the note according to its tenor. (Par. 214, sec. 191, ch. 98, Cahill's Ill. Rev. Stat. 1931, Negotiable Instrument Act.) By paragraph 140, section 118 of the Negotiable Instrument Act,

"A negotiable instrument is discharged:

"1. By payment in due course by or on behalf of the principal debtor.

"2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.

"3. By the intentional cancellation thereof by the holder.

"4. When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

It is clear that the Act specifies how the persons primarily liable may be discharged. "When the legislature has declared, as it has done in these sections, that a negotiable instrument signed by a party who is primarily liable thereon, as that liability is defined by the Act, may be discharged * * * it would seem plain that it meant that the particular method prescribed for the accomplishment of that result should exclude a discharge by any other, or different method, upon the familiar maxim that the express mention of one thing implies the exclusion of another." (Vanderford v. Farmers' Bank, 106 Md. 164.) We agree with the Maryland court that, as to the principal debtor, the note cannot be discharged or extinguished as such except in one of the four methods enumerated in the statute.

The remaining question raised by defendants is whether the plaintiff was authorized by the power of attorney to confess judgment on the note. It is true, that the authority to confess a judgment without process must be clear and explicit, and must be strictly construed, but the question whether or not the plaintiff was authorized by the power of attorney to confess judgment on the note, in our opinion does not arise in this case on the state of the record, for the reason that leave had been granted defendants to plead, and there

was a trial upon the merits.

We conclude that none of the errors assigned calls for a reversal of the judgment and accordingly it is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

and a trial upon the merits.

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35889

MR. ROY R. GRINKER,
(plaintiff),
Appellee,

v.

CARROLL, SCHENDORF &
BOENICKER, Inc., a corporation,
(defendant),
Appellant.

130 7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 620²

MR. PRESIDING JUSTICE KARNER DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover for rents collected by defendant while acting as plaintiff's agent. The cause was tried by the court without a jury, resulting in a finding and judgment for plaintiff for \$326.96, from which defendant appealed.

The statement of claim sets forth that July 22, 1930, plaintiff entered into a verbal agreement with defendant by which he appointed defendant as his managing agent to collect rents issuing from a building in Chicago, for which services he agreed to pay defendant four per cent of the rents collected; that said agency was a temporary employment and was to continue until terminated by plaintiff; that defendant collected the rents for the month of August, 1930, and remitted to plaintiff; that plaintiff during the month of September, 1930, notified defendant to discontinue to act as such agent; that thereafter defendant collected the rents for the month of September, 1930, and remitted from the proceeds thereof \$377.21, but refused and failed to remit \$308.25 which the defendant wrongfully deducted from the proceeds of said September rents.

The affidavit of merits admits that on July 22, 1930, it entered into a verbal agreement with plaintiff whereby it was to act as managing agent for plaintiff to collect all rents as

MR. ROY H. CHURCH,
(plaintiff),
Appellant.

CARROLL, ROBERT A.
ROBINSON, Inc., a corporation,
(Defendant),
Appellee.

APPEAL FROM DECISION
OF THE CIRCUIT COURT
OF THE DISTRICT OF COLUMBIA

287 U.S. 620

MR. JUSTICE BRIDGES delivered the opinion of the court.

Plaintiff sued to recover for wages collected by defendant while acting as plaintiff's agent. The case was tried by the jury without a jury, resulting in a finding and judgment for plaintiff for \$28,700, from which defendant appealed.

The statement of claim sets forth that July 22, 1930, plaintiff entered into a verbal agreement with defendant by which he appointed defendant as his temporary agent to collect wages issuing from a building in Chicago, for which services he agreed to pay defendant four per cent of the wages collected; that said agency was a temporary employment and was to continue until terminated by plaintiff; that defendant collected the wages for the month of August, 1930, and remitted to plaintiff; that plaintiff during the month of September, 1930, notified defendant to discontinue to act as such agent; that defendant collected the wages for the month of September, 1930, and remitted from the proceeds thereof \$277.21, but refused and failed to remit \$280.22 which the defendant actually collected from the proceeds of said September wages.

The affidavit of merits recites that on July 22, 1930, it entered into a verbal agreement with plaintiff whereby it was to act as managing agent for plaintiff to collect all wages as

said rents became due, for which services it was to receive four per cent of the rents collected, and averred that in the event that the agency was terminated by the plaintiff, defendant would be entitled to three per cent of any moneys due or to become due on leases on said building for the unexpired term of said leases, and set up that it had the right to retain \$308.25 by virtue of a general custom in Chicago, to the effect that when an agreement was made between an owner and an agent by which the agent should rent certain property and make the collections thereon, but did not provide as to the period of time during which the agency was to continue, and the owner terminated the agency, the agent should receive from the owner as compensation for the leases made and outstanding three per cent upon the aggregate amount of the rent to fall due on the unexpired term of said leases; and by an additional affidavit of merits alleged an accord and satisfaction by reason of plaintiff's acceptance of the check for \$377.21 with statement of account.

Plaintiff's evidence discloses that he purchased of Alvin H. Reed, a building at 5816 Blackstone avenue, Chicago, Illinois; that the sale was consummated at defendant's office July 22, 1930, where a verbal contract was entered into between plaintiff and one Milo B. French, representing the defendant, by which defendant was to collect the rents while plaintiff was away on a vacation, the contract to be terminated upon plaintiff's return, for which services defendant was to receive four per cent of the rents collected; that defendant took over the management of the building, and when plaintiff returned from his vacation in September he terminated the agreement; that after the collection of the rents by defendant for the month of September it mailed plaintiff a statement of account and a check for \$377.21 to balance, upon receipt thereof plaintiff called at defendant's office and denied that defendant had any right to charge him \$308.25 appearing

said rents become due, for which services it was to receive ten
 per cent of the rents collected, and advised that in the event
 that the agency was terminated by the plaintiff, defendant would
 be entitled to three per cent of any moneys due or to become due
 on leases on said building for the unexpired term of said leases,
 and set up that it had the right to retain \$300.00 by virtue of a
 general power in Chicago, to the effect that when an agreement
 was made between an owner and an agent by which the agent should rent
 certain property and make the collections thereon, but did not provide
 as to the period of time during which the agency was to continue, and
 the owner terminated the agency, the agent should receive from the
 owner an compensation for the leases made and outstanding during the
 term upon the aggregate amount of the rent to fall due on the unexpired
 term of said leases; and by an affidavit filed at said Chicago
 an account and collection by reason of plaintiff's acquiescence in the
 check for \$277.21 with statement of account.
 Plaintiff's evidence discloses that he purchased of Davis
 M. Reed, a building at 2112 Harrison Avenue, Chicago, Illinois, and
 the sale was consummated at defendant's office July 21, 1924, where
 a verbal contract was entered into between plaintiff and said M. R.
 through representing the defendant, by which defendant was to collect
 the rents which plaintiff was to pay on a vacation, the contract to be
 terminated upon plaintiff's return. The verbal contract between said
 to receive from said rent of the rents collected; that defendant took
 over the management of the building, and when plaintiff returned from
 his vacation in September he terminated the agreement, that after
 the collection of the rents by defendant for the month of September
 it was that plaintiff a statement of account and a check for \$277.21
 be delivered, upon receipt thereof plaintiff called at defendant's office

in the account for commissions on unexpired leases.

Defendant's version is that at the closing of the deal between plaintiff and Reed, plaintiff said he would step in Reed's shoes; that he would take over the leases and relieve Reed of any liability for unexpired leases, and directed defendant to continue the management of the property.

Plaintiff denied the statement charged to him that he would step into Reed's shoes and relieve him of any liability for commissions on unexpired leases.

It is contended by defendant that the court erred in not considering a custom prevailing in Chicago, Illinois, that defendant was entitled to commissions for the unexpired term of leases. There would be merit in this contention if there had been no proof of a specific agreement. The proofs show and the court found that defendant's employment by plaintiff was by a special agreement by which defendant was to receive four per cent of the rents collected. Under such circumstances defendant's right to compensation must be determined by the terms of the agreement, as evidence of a custom is never admissible to vary or contradict the terms of an express contract. (Turner v. Osgood Art Colortype Co., 223 Ill. 629, 634; El Reno Grocery Co. v. Stocking, 293 id. 494, 500; Carroll, Schendorf & Boenicke, Inc. v. Simmons, 245 Ill. App. 586, 588; Braude v. Cochran & McCluer Co., 259 Ill. App. 635.)

It is also contended that the finding and judgment is against the weight of the evidence, and defendant's counsel complains of the testimony of plaintiff's attorney. The record discloses that before he testified plaintiff's attorney withdrew from the case. While it is true that it is not proper practice for an attorney connected with the case to appear as a witness and that little weight will be given to his testimony, nevertheless it is not unlawful (Eshelman

v. Rawalt, 293 Ill. 192, 196), and such testimony is competent (Glanz v. Siabek, 233 Ill. 22, 26), as the objection goes only to the credibility of such testimony. (Bozart v. Brasse, 331 id. 150, 175.) In the instant case the trial court saw and heard the witnesses. The facts were sharply controverted. In such case a court of review will not reverse the judgment if the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the judgment. (Barnett v. Caldwell Furniture Co., 199 Ill. App. 510; Leeper v. Gay, 253 Ill. App. 176, 183; Mumphreys v. East St. L. & S. Ry. Co., 253 Ill. App. 450, 457.) Under such circumstances it is the peculiar province of the trial court to determine the preponderance and credibility of the evidence, as it is better able to determine the credibility and weight to be given the testimony than a court of review. (Hills v. Luke, 232 Ill. App. 277, 280; Illinois-Indiana Fair Association v. Phillips, 241 Ill. App. 434.) After examining and considering the testimony we have concluded we would not be warranted in holding the finding and judgment is contrary to the manifest weight of the evidence.

It is finally contended that by reason of plaintiff's acceptance of the check with statement of account, there was an accord and satisfaction. We cannot concur in this contention. An accord and satisfaction must be based upon a compromise, in good faith, of unliquidated or disputed demands, where there is an honest difference between the parties as to the amount due. (Farmers & Mechanics Life Ass'n v. Ching, 224 Ill. 599, 606.) It is true, where there is a bona fide dispute between the debtor and a creditor as to how much is due, a payment of the amount claimed by the debtor to be due in full settlement, if accepted by the creditor, is a satisfaction of the claim. (Snow v. Griesheimer, 220 Ill. 106; In re Estate of Cunningham, 311 id. 311, 315; Kell v. Block Co., 319

id. 339, 341), but the payment of a part of a fixed and certain demand which is due and not in dispute is no satisfaction of the whole debt. (Ostrander v. Scott, 161 Ill. 339, 345; Curtiss v. Martin, 20 id. 557, 578; Morrill v. Baggett, 157 id. 240, 243.)

At the close of all the evidence the court found that after the termination of the agency the plaintiff received a complete statement of account, accompanied by a check for \$377.21, upon which plaintiff received that sum of money; that there was a dispute between the plaintiff and the defendant as to the contract, but that there was no dispute as to the amount of money claimed to be due at the time of accepting the statement and check. These findings were justified by the evidence. The question whether there was a bona fide dispute between the parties as to the amount due, was a question of fact for the court, on which its finding must, on the evidence in the record, be held conclusive. (Teague v. John E. Burns Lumber Co., 137 Ill. App. 225; certiorari denied by the Supreme Court.) In the Teague case, supra, it was said (p. 227):

"It is undoubtedly true that the law of this State as laid down by its highest tribunal in a long line of cases, * * * is that where there is a bona fide dispute between a debtor and creditor as to a portion of a claim made by the creditor, and the debtor sends to the creditor payment of the sum he admits to be due, with the expressed or implied condition that it is to be accepted as payment in full or returned, there is an accord and satisfaction if the creditor retains it, and the creditor cannot thereafter recover the balance he claims to be due. This carries the doctrine of accord and satisfaction farther than the law in most other jurisdictions does. We do not think, however, that this doctrine should be carried farther than these cases render absolutely necessary, in view of the later legislative policy of this State, expressed in section 55 of the Practice Act of 1907, by which, if a plaintiff sues upon a claim of which a part only is disputed, the defendant is required involuntarily, through judgment and execution, to pay at once the part he admits to be due, while 'the suit shall thereafter proceed as to the portion of the plaintiff's demand in dispute as if the suit had been brought therefor.'"

And continuing (p. 228):

"It cannot be that a debtor shows such good faith merely by asserting it. Every dishonest and reluctant debtor might thus harass his creditors by saying: 'Take part or nothing except at the end of a law suit.'"

We think none of the errors assigned calls for a reversal of the judgment and accordingly it is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

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35902

LILLIAN McQUILLEN,
(plaintiff),

Defendant in Error,

v.

WILLIAM H. EVANS,
(defendant),

Plaintiff in Error.

131
X
ERROR TO SUPERIOR
COURT, COOK COUNTY.

267 I.A. 620³

MR. PRESIDING JUSTICE KERRER DELIVERED THE OPINION OF THE COURT.

This is an action commenced March 19, 1929, in assumpsit, for money loaned and for damages for breach of promise to marry. There was a trial, before the court and a jury, resulting in a verdict for plaintiff for \$16,000 and judgment on the verdict. To reverse this judgment defendant sued out this writ of error.

The declaration contained the common counts alleging defendant was indebted to plaintiff in the sum of \$2200, and a special count setting forth a breach of promise to marry, charging that defendant had promised to marry the plaintiff on certain dates enumerated between November 1, 1919, and May 5, 1924, in consideration of a like promise on the part of plaintiff, and that thereafter the defendant wilfully, wrongfully and injuriously, without any fault on plaintiff's part, refused to marry her, although she was ready, willing and able to marry defendant. To the common counts defendant filed the general issue, and to the special count the general issue and a plea of the five year Statute of Limitations, and two additional pleas, that at the time of making the supposed promises plaintiff knew defendant had a wife living.

It is contended that a married man cannot make a valid promise of marriage which may render him liable for a breach
cannot appearing here for plaintiff in error were not in the case the he should have been



Set 1.A. 620

EXHIBIT NO. 1
IN RE: [illegible]
[illegible]
[illegible]
[illegible]
[illegible]

This is an action commenced March 12, 1930, in [illegible]
for money loaned and for damages for breach of promise to marry.
There was a trial, before the court and a jury, resulting in a
verdict for plaintiff for [illegible] and judgment on the verdict. To
reverse this judgment [illegible] was set aside at [illegible].
The decision contained the common counts alleging
defendant was indebted to plaintiff in the sum of \$2000, and a
special count setting forth a breach of promise to marry, charging
that defendant had promised to marry the plaintiff on certain dates
commencing between November 1, 1927, and May 2, 1928, in consideration
of a like promise on the part of plaintiff, and that thereafter
the defendant wilfully, wrongfully and injuriously, without any
legal or plaintiff's part, refused to marry her, although she was
ready, willing and able to marry defendant. To the common counts
defendant filed the general issue, and to the special count the
general issue and a plea of the five year statute of limitation,
and two additional pleas, that at the time of making the supposed
promise plaintiff knew defendant had a wife living.

thereof. In Paddock v. Robinson, 63 Ill. 99, the court cited cases holding that a married man could become liable upon a promise of marriage if the plaintiff at the time defendant made the promise was not aware that he had a wife living; in other words, was an innocent party. The court said (p. 100): "In such cases, courts may well hold that the promiser can not avail himself of his fraudulent concealment of his marriage as a defense to an action upon the contract." In Kelley v. Eiley, 106 Mass. 339, the court at page 342, said: "The court was asked to rule that, if the defendant was a married man at the time of his promise, the plaintiff could not be injured by a failure to perform, and though she had no knowledge of that fact at the time, could not maintain this action. This was properly refused. The defendant is not permitted to escape responsibility on the ground of his present legal inability to perform a promise of marriage to an innocent party." In Canmerer v. Muller, 14 N. Y. Supp. 511, 512, it was said: "It cannot be that where a man induces a woman to enter into a promise of marriage, she knowing of no disability, that she cannot recover damages for the breach of such contract, if it turns out that he is incapable of fulfilling it. * * * It would be giving a premium to a villain to enter into a contract of this kind, and, if you please, apparently consummate it, and then, when called to respond, claim that he cannot be held because he never could have completed the contract." See also Carter v. Hinker, 174 Fed. 882. We conclude, therefore, that an action may be maintained upon a married man's breach of contract to marry, provided the contract was entered into by the woman in ignorance of the promiser's existing marriage.

Defendant's next contention is that for more than five years before the commencement of her suit plaintiff knew he had a wife living and consequently was not in a position to make a binding

... In Robinson v. Robinson, 22 Ill. 92, the court said
... having said a married man could become liable upon a promise
... of contract if the plaintiff at the time believed that the promise
... was not aware that he had a wife living in other words, was an
... innocent party. The court said (p. 100): "The court would not
... say well hold that the promisee was not aware of his fraudulent
... concealment of his marriage as a defense to an action upon the con-
... tract." In Robinson v. Robinson, 22 Ill. 92, the court at page 92,
... said: "The court was asked to rule that, if the defendant was a
... married man at the time of his promise, the plaintiff could not be
... injured by a failure to perform, and though she had no knowledge of
... that fact at the time, would not maintain this action. This was
... properly refused. The defendant is not permitted to escape
... responsibility on the ground of his present legal inability to
... perform a promise of marriage is an innocent party." In Robinson
... v. Robinson, 22 Ill. 92, the court said: "It cannot be
... that every man induced a woman to enter into a promise of marriage,
... and knowing of no disability, that she cannot recover damages for the
... breach of such contract, if it turns out that he is incapable of ful-
... filling it." "It would be giving a promise as a villain is made
... into a contract of this kind, and, if you please, apparently consent
... to, and then, when called to respond, claim that he cannot be held
... because he never would have completed the contract." See also Robinson
... v. Robinson, 174 Ill. 382. ... a contract, therefore, that an action may
... be maintained upon a married man's breach of contract to marry.
... provided the contract was entered into by the woman in ignorance of
... the promisor's existing marriage.
... defendant's wife continues to live for many years
... years before the commencement of her suit plaintiff knew he had a

promise of marriage.

Plaintiff testified that she first met defendant in September, 1919; that on November 1, 1919, he asked her to marry him and she accepted; that between that date and July, 1920, she saw him three nights a week; that defendant was working on some patents and said just as soon as he made some money they would be married; that in 1923, she was still keeping company with defendant, but that he was very much discouraged, and that he told her he would give up if it were not for her encouragement; that she advanced him money for his personal needs and paid for some of his clothing; that May 5, 1924, he told her that he was making \$50 a week and they would be married Decoration Day, 1924, to which she agreed; that on Decoration Day, 1924, defendant called for her at the appointed hour; that she entered his automobile and drove some distance from her home when he told her he could not get married; that he was married and not divorced; that he then said he would procure a divorce in August, 1924; that she never before May 30, 1924, knew defendant was a married man; that she continued going with defendant because he said he would obtain a divorce, and that she waited for him to obtain the divorce until March, 1929, and that she was ready, able and willing at all times to marry him.

Mary Schissler, plaintiff's sister, Mrs. Peter Tomaras and Mrs. Adolph Westerman, testified that defendant told them that he would marry plaintiff May 30, 1924. Mary Schissler also testified that plaintiff, while living with her had made preparations for the marriage, and on the morning of Decoration Day she accompanied plaintiff to the automobile and there congratulated defendant on a happy marriage.

Defendant denied he had ever promised to marry her and testified that at the date of the trial and since 1902 he had been

married; that he and his wife separated in 1917; that he had three children living in Los Angeles; that within three or four weeks after he met plaintiff he told her he was a married man, but was not living with his wife; that in 1919 he showed her pictures of his wife and children, and called Anna Beard, F. L. Beard, Elsie Miller, Mrs. Frank Sapaico, Mrs. Prudence McCague, in his behalf. Their testimony is contradictory to that of plaintiff that she did not know he was a married man until December, 1924.

The weight of the evidence is not a question of mathematics but depends upon its effect in inducing belief. It often happens that one witness standing uncorroborated would tell a story so natural and reasonable in its character, and in a manner so sincere and honest as to command belief, although several witnesses of equal apparent respectability would contradict him. The question for the jury is not on which side are the witnesses most numerous, but what testimony do you believe? (Braunschweiger v. Waits, 179 Pa. St. 47, 51.)

Whether the plaintiff was to be believed, or whether the truth was on the side of the defendant and his witnesses, was a question for the jury. They had an opportunity to see and hear and observe the appearance of the witnesses and their manner of testifying, and were in a much better position to determine the truth of the matter in controversy than a court of review. The verdict of the jury means that they believed plaintiff and her witnesses and disbelieved defendant and his witnesses, and this they had a right to do. (Podolski v. Stone, 186 Ill. 540; Kennedy v. Modern Woodmen, 243 id. 560.) And in such case the question is one not merely of numbers, but of credibility. (Chicago Union Traction Co. v. O'Donnell, 113 Ill. App. 259, 261.) However, notwithstanding the verdict, it is our duty to examine and weigh the evidence, but this duty does not require nor permit this court

to substitute our judgment for that of the jury on a pure question of fact unless we can say that the conclusion reached by the jury is palpably wrong. (Welsh v. Chicago City Ry. Co., 195 Ill. App. 146, 152; Calvert v. Carpenter et al., 96 Ill. 63; Chevalier v. Seager et al., 121 id. 564; Hollenbeck v. Cook, 130 id. 48.) In the instant case there was a clear conflict in the evidence and under such circumstances it is the peculiar province of the jury to determine the preponderance and credibility of the evidence. (Willa & Co. v. Luke, 232 Ill. App. 277, 280; Leeper v. Gay, 253 Ill. App. 176, 183; Humphreys v. East St. L. & N. Ry. Co., 253 Ill. App. 450, 457; Rimer v. Miller, 255 Ill. App. 465, 470.) After examining the testimony and weighing the evidence and the apparent conflict therein, we have reached the conclusion that we would not be warranted in holding the verdict and judgment against the manifest weight of the evidence.

In defendant's printed brief and argument complaint is made of plaintiff's given instructions 1, 2, 3, 4, 5, 6, 12, 13 and 14, but on oral argument defendant's counsel stated that defendant relies, as a ground for reversal, only upon instructions 1, 3, 4 and 12. We shall, therefore, only consider the instructions of which complaint was made upon oral argument.

Instruction No. 1 told the jury that the plaintiff could recover, in addition to damages for breach of promise, whatever amount the jury believed was owing the plaintiff because of her having loaned defendant various sums of money. It is claimed the instruction assumes a breach of promise, and that it assumes plaintiff is entitled to damages for breach of promise without making a binding contract of marriage between them an essential thereof. We have examined the instruction and are of the opinion it is not subject to the criticism claimed.

[illegible]

12. In a small, therefore, only consider the instructions of which
 13. as a group for review, only upon instruction 14, 15, 16 and
 14. For an oral argument before the court, the court should
 note at plaintiff's given instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and
 15. In defendant's given instructions 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 82

we have examined the instruction and one of the opinion it is not
definite contract of marriage between them on canonical grounds.
It is sufficient to charge the parish of promise without making a
declaration between a priest or priestess, and that it contains nothing
showing intent between various sums of money. It is claimed the
sums the jury believed was owing the plaintiff because of her
marriage, in addition to charges for board of husband, clothing,
Instruction No. 1 said the jury find the plaintiff could

It is urged that instruction No. 3 should not have been given. By that instruction the jury were told that even though they find the issues against the plaintiff as to the breach of promise claim, nevertheless if they believe that at any time within five years from the filing of the suit defendant promised to pay the plaintiff \$1,000 for money before that time loaned by plaintiff to defendant, they should by their verdict allow plaintiff \$1,000. It is claimed that it omitted the fact of whether defendant has already repaid this money to plaintiff. It is sufficient to say the case was tried upon the theory that defendant never received any money from plaintiff by way of a loan or otherwise.

It is also insisted that the court erred in giving instruction No. 4. By this instruction the jury were told that if they found for the plaintiff they had the right to award punitive damages in addition to actual damages if they believed that punitive damages should be awarded. The criticism aimed at this instruction is that it did not tell the jury under what circumstances punitive damages should be awarded, and in support of this contention Baumle v. Verde, 184 Pac. 1083, and Moore v. Hopkins, 83 Calif. 370, are cited. In our opinion they are not applicable. The instruction in Baumle v. Verde, supra, was criticised because the statute of Oklahoma provided that punitive damages in breach of promise cases were allowable only when the defendant was guilty of oppression, fraud or malice. In Moore v. Hopkins, supra, the instruction was condemned because there was no evidence of bad motives of the defendant.

An action for a breach of promise of marriage constitutes an exception to the general rule which forbids punitive damages in actions ex contractu. (Jacoby v. Starck, 206 Ill. 34.) The action is given as an indemnity to the injured party for the loss she has sustained, and embraces injury to the feelings, affections, and wounded pride, as well as the loss of marriage, and no fixed measure

of damages can be laid down; and the jury, if not actuated by prejudice, passion or corruption, exercises a very wide discretion as to the amount of compensation to be awarded. (Sedgwick on Damages, (5th Ed.) 228, 421.) If the conduct of the defendant in violating his promise is characterized by a disregard of the plaintiff's feelings, or reputation; if he has placed her, or induced her to place herself, in a false position, or to forego temporal advantages; if the breach of his promise is unjustifiable; if he spreads upon the record matters in defense of the action which are scandalous and tend to reflect discredit upon the plaintiff, or stain her reputation, then these are all circumstances which may be considered by the jury and may be availed of by them to enhance the damages. (Chellis v. Chapman, 124 N. Y. 222.) There is no fixed rule of damages, and the jury may, in the exercise of a sound discretion, allow punitive damages. (Kelley v. Highfield, 15 Ore. 277, 290.) And for the purpose of enabling them to reach a proper conclusion as to the amount of damages, they have a right to consider the entire course of conduct of the parties toward each other up to and including the time of the trial; and if the defendant at any time, even upon trial, makes a wrongful attempt to blacken her name or reputation, the jury have a right to consider it and may, if they think proper, add something to the amount of damages on account of such new or additional wrong. (Kelley v. Highfield, supra, p. 291.)

By instruction No. 3, the court instructed the jury that if they found for the plaintiff, in determining the amount of damages, they may take into consideration, if it does appear, her mortification; injured feelings and affections; wounded pride, length of engagement; the depth of her devotion, etc. The evidence discloses a long courtship, during which time defendant monopolized plaintiff's attention; that he rudely broke off the engagement, saying he would have the luxuries that life could afford; that people do not get married

at damages can be laid down and the jury, it was suggested by
the judge, consider on corruption, considered a very wide discretion
as to the extent of compensation to be awarded. (Exhibit A)
The judge said that if the contract was not made in
violation of his promise to the plaintiff by a defendant of the plain-
tiff's feelings, or reputation, or business, or income,
nor to place himself in a false position, or to cause damage,
or advantage; if the breach of his promise is not material; if he
repents upon the facts which are in evidence of the action which are
material and tend to reflect adversely upon the plaintiff, or
upon his reputation, then there are all circumstances which may be
considered by the jury and may be availed of by them to enhance the
damages. (Exhibit A, CHAPMAN, 100 N. Y. 222.) There is no fixed
rule of damages, and the jury may, in the exercise of a sound dis-
cretion, allow punitive damages. (Exhibit A, CHAPMAN, 100 N. Y. 222.)
And for the purpose of enabling them to reach a proper con-
clusion as to the amount of damages, they have a right to consider
the evidence as to the conduct of the plaintiff and his state of
mind and feeling at the time of the injury and at the defendant's con-
duct, even upon trial, where a wrongful attempt to blackmail has been
made. The jury have a right to consider it and may, if they
think proper, and entitled to the amount of damages on account of
such use of additional words. (Exhibit A, CHAPMAN, 100 N. Y. 222.)
By instruction No. 1, the court instructed the jury that
if they found for the plaintiff, in ascertaining the amount of damages,
they may take into consideration all the facts and circumstances
which they find and determine, and may, in their discretion, award
the sum of ten thousand dollars. The evidence indicates a loss of
sight, and that which is a substantial impairment of the plaintiff's

new-a-days; they only promise; marriage is old-fashioned; and two of defendant's witnesses attempted to blacken and besmirch plaintiff's reputation, in that they testified that plaintiff said to them, "If Mr. Evans could not get a divorce, the least he could do was to establish me in a flat and live with me." This was evidence upon which a verdict might well include exemplary or punitive damages, and as the jury were required to base their assessment of damages on the evidence, the giving of the instruction complained of did not constitute error.

The next contention of defendant's is that the court erred in giving to the jury instruction No. 12, as follows:

"The Court instructs the jury that if you believe any witness in this case has knowingly and wilfully testified falsely to any matter at issue in said cause, then the jury may disregard the entire testimony of any such witness, except insofar as the same may have been corroborated by credible evidence or by facts and circumstances proven in the trial of the case."

The statute requires the false testimony to make out perjury to be "in a matter material to the issue or point in question." It is therefore apparent that the words "matter at issue" are not in the exact words of the statute. Even so, this inaccuracy is not sufficient error to reverse the judgment, as the instruction could not have misled the jury and hence did defendant no harm. The matter in issue was the making of the marriage promise and whether or not at the time of making such promise plaintiff knew defendant was a married man. In Lacey v. People, 116 Ill. 555, in which the death penalty was inflicted, complaint was also made of an instruction which ignored the principle, that such knowingly false testimony must be on some matter material to the issue. The court condemned the instruction and said it was indefensible, but held no reversible error was committed and affirmed the judgment. In Datz v. Schertz, 135 Ill. 190, it was contended, and the court held, that certain instructions were bad, because they omitted the qualification that the false

new-beggs that only promised marriage in his loneliness and the
-of his own's presence seemed to be the only thing that
left's suggestion, in that they could not live with him and
that, "if Mr. Evans could not get a divorce, the least he would do
was to establish me in a flat and live with me." This was evidence
upon which a verdict might well have been given in the case.

beginning to increase as that used at Baltimore was used and as the
for his to determine whether and to which the evidence was

The word "contention" is defined as follows:

to bring to the very location of the

[illegible]

The above pictures are taken from the same scene as the one on the left. It is a picture of the same scene as the one on the left. It is a picture of the same scene as the one on the left.

1. The first of these is the fact that the word "and" is used in the text to connect the two clauses. This is a common usage in English, and it is not unusual for the word "and" to be used in this way. The second of these is the fact that the word "and" is used in the text to connect the two clauses. This is a common usage in English, and it is not unusual for the word "and" to be used in this way. The third of these is the fact that the word "and" is used in the text to connect the two clauses. This is a common usage in English, and it is not unusual for the word "and" to be used in this way.

10-10-1944

and the matter of the mortgage proceeds was settled at that time.

IN REPLY TO MEMORANDUM OF THE ATTORNEY GENERAL

the principal: that such knowledge may be of some

not were otherwise on 5/24/64, but it was not possible to determine the exact date of the meeting.

testimony must be with regard to a material matter in issue, in order to justify the jury in disregarding the whole evidence of a witness whose testimony is false in part. In disposing of the contention the court said (p. 134): "On examining the evidence, however, it is not perceived how this omission * * * could have prejudiced the appellant, for it is apparent that all the supposed false testimony to which the instructions would be understood to refer, was upon material points. When this is so the error will not vitiate, even in capital cases, where life is at stake. (Lacey v. The People, 116 Ill. 555.)" In the instant case the only witness for the defendant as to whether or not the promise was made was the defendant himself, and the only testimony of all the other witnesses for defendant was upon the proposition that plaintiff knew defendant was a married man at the time of the promise. It is, therefore, clear that all of the testimony of defendant's witnesses was upon matters material to the issue.

It is also contended that the damages assessed by the jury are excessive. In actions for breach of contract to marry the jury are the sole judges of the amount that shall be awarded as damages and the court will interfere only when it is apparent the jury have misunderstood the evidence or that they have been governed by passion or prejudice, or have acted with reckless disregard of the evidence. (Douglas v. Gaugman, 63 Ill. 170, 171; Richmond v. Roberts, 98 id. 472, 480.) The evidence shows that plaintiff met defendant in September, 1919; that between November 1, 1919, and July 20, 1920, he called on her three nights a week; that after July, 1920, he visited her nearly every night; that on November 1, 1919, he asked her to marry him; that it was understood between them that because of his financial condition at the time they could not be married until conditions improved; that he would have been an

testimony must be with regard to a material matter in issue, in order to justify the jury in disregarding the whole evidence of a witness whose testimony is false in part. In disposing of the testimony the court said (p. 186): "On examining the evidence, however, it is not perceived how this omission can be regarded as prejudicial to the appellant, for it is apparent that all the material facts testified to which the jury would be understood to believe, were upon material points. When this is so the error will not vitiate, even in capital cases, where life is at stake. People v. The People, 111 Ill. 488." In the instant case the only evidence for the defendant as to whether or not the female was with him the instant himself, and the only testimony at all the instant for defendant was upon the question of the defendant's own statement was a question made at the time of the hearing. It is therefore, clear that all of the evidence is immaterial to the question and upon matters material to the issue. It is also understood that the charges returned by the jury are correct. In answer to the question of whether or not the jury are the sole judges of the weight that shall be accorded to the evidence and the court will instruct only when it is apparent that the jury have misapprehended the evidence or that they have been misled by passion or prejudice, or have acted with conscious disregard of the evidence. (People v. Zimmerman, 111 Ill. 170, 171.)

People v. Zimmerman, 111 Ill. 170, 171. The evidence shows that defendant was detained in custody, 1900, and between January 1, 1901, and July 30, 1900, he called on her three nights a week; that after July, 1900, he visited her weekly every night; that on November 1, 1900, he asked her to marry him; that it was understood between them that because of the financial condition of the time they could

absolute failure if plaintiff had not come to his assistance and encouraged him and cheered him and made it possible for him to go on; and the undisputed evidence shows that defendant was the owner of 242 shares of the preferred stock of a total issue of 250 shares of the capital stock in a corporation whose financial worth shortly before the trial was in excess of \$52,000. After considering the facts and circumstances of this case and the authorities applicable, we cannot say the verdict is excessive.

It is finally urged it was error to admit in evidence certain financial statements of the Evans Flexible Reamer Corporation made to a bank for the purpose of establishing credit with the bank, defendant's counsel arguing that these statements did not tend to prove his financial worth, and were not given by the defendant individually but by the corporation of which he was president. The first of these statements, addressed to the Citizens State Bank, purports to show the condition of the Evans Flexible Reamer Corporation on December 31, 1929, and is sworn to by the defendant, and the other statements purport to show the condition of the same corporation on December 31, 1930. Both statements show defendant owned all but two shares of the capital stock of the corporation whose financial worth at the time the statements were made was between \$52,000 and \$63,000. There was no evidence offered by defendant that the statements were not correct. In fact, defendant admitted they were true and correct. The statements were relevant, tended to show the financial worth of the defendant, and the court did not err in its rulings.

Finding no reversible error in the record the judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

35911

ANNA HOPSTEIN,
(plaintiff),

Plaintiff in Error,

v.

FRANK WARADY,
(defendant),

Defendant in Error.

132 7
ERROR TO MUNICIPAL
COURT OF CHICAGO.

267 I.A. 620+

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant to recover the value of a fur collar and cuffs claimed to have been removed from plaintiff's fur coat. The cause was tried by the court without a jury, resulting in a finding for the defendant and a judgment against the plaintiff for costs. To reverse this judgment plaintiff prosecutes the present writ of error. The defendant has not appeared or filed a brief in this court.

The statement of claim as amended July 10, 1931, sets forth that on May 1, 1931, plaintiff left with defendant for the purpose of having buttons changed, a certain fur coat, and that defendant wilfully and wrongfully removed the fur collar and cuffs. Defendant's affidavit of merits denies he removed any collar from the coat.

Plaintiff's evidence discloses that on or about May 4, 1931, she called at defendant's place of business and told him she had a fur coat that was too wide for her; that she desired to change the buttons and that it be taken in so it would fit her; that on the following day (Monday) she brought the coat to defendant's shop; that defendant returned the coat on Tuesday; that as soon as she saw the coat she accused him of changing the collar and cuffs; that that he denied the accusation;

1941

STATE OF NEW YORK
IN SENATE
JANUARY 1, 1941

REPORT OF THE

COMMISSIONER OF THE

STATE OF NEW YORK

STATE OF NEW YORK
IN SENATE
JANUARY 1, 1941

THE COMMISSIONER OF THE STATE OF NEW YORK

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that he denied the accusation.

the collar and cuffs on the coat when it was delivered to defendant were Mink and the lining was muskrat; that the collar and cuffs on the coat when it was returned to plaintiff were not the collar and cuffs that were on the coat when it was delivered to defendant.

The defendant testified that he is a tailor by trade at 2504 Montrose avenue, Chicago; that he is not a furrier; that he has known plaintiff for some time; that she came to his shop and said she had a fur coat which was too wide and wanted it taken in; that he was the only one she would trust with the coat; that she brought it to him on Monday; that he took it in at the waist and returned it to her the next morning; that she looked at the coat and accused him of changing the collar and cuffs; that he denied the accusation and said he had not touched the collar and cuffs; that the coat never left his shop; that he had it in his possession from the time it was brought to him until he returned it to her.

It is contended that defendant's affidavit of merits was not sufficient to negative the allegation of the statement of claim, in that the statement of claim charged the removal of the collar and cuffs while the affidavit of merits denied only the removal of the collar. It appears from the record that in the statement of claim filed June 2, 1931, plaintiff charged defendant with removing a fur collar. June 15, 1931, defendant filed his affidavit of merits and in that affidavit of merits he denied the removal of any collar from the coat. The case proceeded to trial July 10, 1931, and it was then the plaintiff amended her statement of claim by adding after the word "collar" the words "and cuffs". The record does not disclose that plaintiff made any request that defendant file an additional or amended affidavit of merits, but proceeded to trial without requiring defendant to file an amended affidavit of merits.

with that were on the coast when it was delivered to defendant.
The coast when it was returned to plaintiff was not the collar and
were like and the lining was unchanged; that the collar and cuffs on
the collar and cuffs on the coat when it was delivered to defendant

It is contended that defendant's affidavit of arrest was true at the time it was made and he will be released if he can show the cost never left his pocket and he had it in his possession the investigation and said he had not pocketed the collar and that he suggested him of changing the collar and collar; that he denied returned it to her the next morning; that she looked at the cost brought it to him on Monday; that he took it in at the waist and that he was the only one who would have with the cost; that she said she had a few cost which was too wide and wanted it taken in; was known plainly for some time; that she came to his shop and 2204 Madison Avenue, Chicago; that he is not a Jew; that he is the defendant declared that he is a Jew by birth as

Under this state of the record we are of the opinion that there is no merit in plaintiff's contention.

It is also contended that the finding and judgment is against the weight of the evidence. There was a clear conflict in the evidence. The plaintiff testified that the collar and cuffs on the coat when it was returned to her by defendant were not the collar and cuffs on the coat when she delivered it to the defendant, while the defendant testified he had not removed the collar and cuffs. In a case tried by the court without a jury, where there is irreconcilable conflict in the testimony a court of review will not reverse the judgment if the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the judgment. Barnett v. Caldwell Furniture Co., 199 Ill. App. 510; Leeper v. Gay, 253 Ill. App. 176, 183; Mumphreys v. East St. L. & S. Ry. Co., 253 Ill. App. 450, 457.) Under such circumstances it is the peculiar province of the trial court to determine the preponderance and credibility of the evidence. Where the controlling point in the case is supported by the testimony of one witness and contradicted by another witness who, from the reading of the printed page of the record, appears to be equally credible, a court of review is not warranted in disturbing the finding of the trial court, because under the law this court cannot disturb such finding unless it is clearly against the manifest weight of the evidence. There are many things which the trial court observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. The trial court is in a much better position in such case to determine the truth of the matter in controversy than a court of review. (Mills & Co. v. Duke, 232 Ill. App. 277, 280; Marble v. Marble, 304 Ill. 229; Illinois-Indiana Fair Association v. Phillips,

...this state of the record we are of the opinion that there is no merit in plaintiff's contention.

It is also contended that the finding and judgment is against the weight of the evidence. There was a clear conflict in the evidence. The plaintiff testified that the collar was on the coat when it was returned to her by defendant and that collar and cuffs on the coat when she delivered it to the defendant. While the defendant testified he had not removed the collar and cuffs. In a case tried by the court without a jury, where there is irreconcilable conflict in the testimony a court of review will not reverse the judgment if the evidence of the unsuccessful party, when considered by itself, is clearly sufficient to sustain the judgment. People v. Smith, 202 Ill. App. 484. Under such circumstances it is the peculiar province of the trial court to determine the propriety and credibility of the evidence. Where the conflicting point in the case is supported by the testimony of one witness and contradicted by another witness who, from the reading of the printed page of the record, appears to be equally credible, a court of review is not warranted in disturbing the finding of the trial court, because under the law this court cannot disturb such finding unless it is clearly against the manifest weight of the evidence. There are many cases in which the trial court chooses on the trial in such case that he has expert from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. The trial court is in a much better position in such case to determine the truth of the matter in controversy than a court of review. People v. Smith, 202 Ill. App. 484. People v. Smith, 202 Ill. App. 484.

241 Ill. App. 454.) After examining and considering the testimony we are of the opinion that we would not be warranted in holding the finding and judgment is contrary to the manifest weight of the evidence.

It is finally contended that the court erred in excluding certain testimony offered on behalf of the plaintiff. During the examination of the plaintiff she was asked if she knew the value of the coat and the collar and cuffs before the coat was delivered to the defendant and what was that value when it was returned to her. Whether or not the court erred in sustaining the objection to this testimony is of no consequence in view of the fact that the court found the issues against the plaintiff and in favor of the defendant.

We think none of the errors assigned called for a reversal of the judgment and accordingly it is affirmed.

AFFIRMED.

Seannan and Gridley, JJ., concur.

THE COURT OF APPEALS (1891) - AFTER READING AND CONSIDERING THE EVIDENCE
WE ARE OF THE OPINION THAT WE WOULD NOT BE WENTWARD IN HOLDING THE
FINDING AND JUDGMENT IS CORRECT AS THE MATERIAL WEIGHT OF THE EVI-

DENCE.

IT IS FINALLY CONCLUDED THAT THE COURT ERRED IN CONSIDERING
CERTAIN EVIDENCE OFFERED ON BEHALF OF THE PLAINTIFF. BEYOND THE
EXAMINATION OF THE PLAINTIFF WHO WAS ASKED IF SHE KNEW THE VALUE OF
THE COAT AND THE COLLAR AND CUFFS BEFORE SHE WAS DELIVERED TO
THE DEFENDANT AND WHEN SHE KNEW THAT SHE WAS TO RETURN TO HER.
FURTHER OR NOT THE COURT ERRED IN MAINTAINING THE OBJECTION TO THIS
EVIDENCE IS OF NO CONSEQUENCE IN VIEW OF THE FACT THAT THE COURT
THREW THE ISSUE AGAINST THE PLAINTIFF AND IN FAVOR OF THE DEFENDANT.
WE THINK NONE OF THE OTHERS SAID OR WRITTEN FOR A REVERSAL

OF THE JUDGMENT AND NO REVERSAL IS IN ORDER.

REVEREND

JOHN AND GRACE, 11. 11. 1891.

GEORGE BAPTIST,
(Plaintiff) Appellee,

vs.

MENDELSON BROS. PAPER STOCK
COMPANY, a Corporation,
(Defendant) Appellant.

133
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 620⁵

MR. PRESIDING JUSTICE KENDER DELIVERED THE OPINION OF THE COURT.

George Baptist, plaintiff, sued Mendelson Bros. Paper Stock Company and Laura Stever, administratrix of the estate of Mary Towle, deceased, in a fourth class tort action to recover ^{for} damages to his truck and for personal injuries received by him, alleged to have been caused by the negligence of the defendants. There was a verdict in favor of plaintiff for \$1,000 against both defendants. The plaintiff, after the jury had rendered its verdict, dismissed the suit as to the administratrix of Mary Towle and judgment was entered against the Mendelson Bros. Paper Stock Company and it has appealed.

In plaintiff's amended statement of claim it is alleged in 1929, substance that on December 31, Mary Towle, now deceased, during her lifetime was the owner and in possession of a building at 63rd street and Dorchester avenue, on the south end of which was a fire escape made up of a ladder which operated upward and downward and into the alleyway, on the rear of the building; that said fire escape was suspended 10 feet above the surface and over said alley; that said Mary Towle negligently constructed and maintained said fire escape at an insufficient height to permit trucks to pass safely through said alleyway; that the Mendelson Bros. Paper Stock Company, through its servant, negligently drove and operated its truck into said alley and against the said fire escape, thereby breaking and pulling said ladder down into said alley, partially blocking said alleyway so that there was insufficient clearance between the bottom of said fire escape ladder and the surface of said alley to permit a truck to pass safely through said alleyway, thereby rendering the

100

GEORGE BARTLEY,
(Plaintiff) vs. JAMES BROWN

GEORGE BARTLEY, Plaintiff,
vs. JAMES BROWN, Defendant,
a Corporation.

2871A. 100

THE HONORABLE JUSTICE KENNEDY DELIVERED THE VERDICT OF THE COURT.

George Bartley, Plaintiff, and James Brown, Defendant, were both
Company and James Brown, administrator of the estate of Mary Towle,
deceased, in a fourth class jury action to recover damages to his
truck and for personal injuries received by him, alleged to have
been caused by the negligence of the defendant. There was a ver-
dict in favor of Plaintiff for \$1,000 against both defendants. The
Plaintiff, after the jury had rendered its verdict, filed an appeal
with as to the administrator of Mary Towle and judgment was entered
against the defendant. The defendant then appealed and it was ordered
in Plaintiff's amended statement of claim it is alleged in
substance that on December 31, 1929, Mary Towle, now deceased, having her
residence was the owner and in possession of a building at 612
street and Worcester Avenue, on the south end of which was a fire
escape made up of a ladder which opened upward and downward and
into the alleyway, on the rear of the building; that said fire escape
was suspended 10 feet above the surface and over said alley; that
said Mary Towle negligently constructed and maintained said fire
escape as an inefficient means to permit escape in case of fire;
through said alleyway; that the defendant then, upon such escape,
through the court, negligently drove and operated the truck into
said alley and against the said fire escape, thereby breaking and
killing said ladder and said alley, thereby causing said
alleyway so that there was insufficient clearance between the bottom
of said fire escape ladder and the surface of said alley to permit a

use of said alleyway dangerous to other persons likely to be driving through said alleyway, all of which facts Mary Towle and the Mendelson Bros. Paper Stock Company knew, or in the exercise of ordinary care ^{on} their part should have known, in sufficient time to have said fire escape ladder repaired and from obstructing said alleyway and to warn plaintiff of the dangerous obstruction created, but Mary Towle and Mendelson Bros. Paper Stock Company negligently and carelessly failed to place a light or some other suitable means of warning the plaintiff; that plaintiff on the night of December 31, 1929, was driving his truck through said alley, in the exercise of ordinary care for his own safety and the safety of his truck, and without knowledge of said obstruction ran his truck into said fire escape ladder and he thereby sustained severe injuries, etc.

By defendant's affidavit of merits it denied it ran into the fire escape and that it negligently operated the truck through said alley and alleged that plaintiff was injured because of his negligence.

The material facts as disclosed by the record are that Mary Towle during her lifetime owned the building at the southwest corner of 63rd street and Dorchester avenue, Chicago, the rear of which abutted on a public alley 16 or 18 feet wide, running east and west; that the west end of the building, horizontal with the building, 11½ feet above the surface of the alley, had two fire escapes, one on the front and one in the rear, equipped with iron ladders 2 or 3 feet wide; that "about Christmas time, 1929," between 3:30 and 4:00 p. m., a large truck loaded with bundles of paper, with the name of "Mendelson" on it, came from the Illinois Central station across the street and into this alley, and struck the fire escape; that a colored man on the truck took a piece of wood and shoved the fire escape back so that the truck could go

one of said alleyway was in some manner likely to be
striking through said alleyway, all of which facts were
known to the defendant from the time he was arrested, at the time
of ordinary care, their part should have been, in addition
time to have said the escape ladder required and from electric-
ing said alleyway and so warn plaintiff of the dangerous situa-
tion created, but they failed to do so and defendant was injured
greatly negligently and carelessly failed to place a light on some
other suitable means of warning the plaintiff; that plaintiff on
the night of December 31, 1929, was driving his truck through said
alley, in the exercise of ordinary care for his own safety and the
safety of his truck, and without knowledge of said dangerous con-
dition into said the escape ladder and he thereby sustained
serious injuries, viz.
By defendant's affidavit of denial it would be found that
the fire escape was not in compliance with the fire laws
said alley and alleged that plaintiff was injured because of his
negligence.
The material facts as disclosed by the record are that
Mary Towle having her residence owned the building at the southwest
corner of 32nd street and Broadway Avenue, Chicago, one year or
which abutted on a public alley 10 or 12 feet wide, running east
and west; that the west end of the building, horizontal with the
building, 11 1/2 feet above the surface of the alley, had two fire
escapes, one on the front and one in the rear, equipped with iron
ladders 2 or 3 feet wide; that "about December 31, 1929," be-
tween 8:30 and 4:00 p. m., a large truck loaded with bundles of
paper, with the name of "Lombardson" on it, came from the Illinois
Central crossing across the street and into said alley, and struck
the fire escape; that a ladder was on the front foot a piece of

by; that when the truck backed around the fire escape the ladder part of the fire escape was pulled out from the building, with the back end of the ladder facing east, the ballast being 6 feet from the ground, and was left in that position; that the janitor of the building and one Morgan immediately thereafter pulled the ladder as near as they could to the wall and left it hanging down about 2 feet.

It also appears that one evening about December 24, 1929, one John Watson visited the premises in the rear of the Towle building and saw a fire escape 50 or 75 feet east and on the north side of the alley attached to the Towle building, hanging downward into the alley 8 or 10 feet from the building wall; the lowest part was about 7 feet from the top of the surface of the alley.

It further appears that at about 7 p.m., December 31, 1929, while plaintiff was driving his truck, 10 feet high with a covered top, in a westerly direction in the alley in question, and when about 75 to 100 feet in the alley, the top of his truck struck against the ladder of a fire escape, which attached itself to the top of his truck; that he climbed to the top of his truck and while endeavoring to release the ladder, a spring attached to the ladder struck him on both his legs. His helper then came up and aided him in freeing the truck from the fire escape. At the time in question it was dark and there was no light of any kind on the fire escape.

It does not appear from the record as to how the fire escape was placed at the time of the alleged striking of it by the truck "about Christmas time," nor does it appear as to which fire escape the truck struck, and there is no evidence that the fire escape that plaintiff struck was the same fire escape that was struck "about Christmas time," and the record discloses that when the janitor and Morgan pulled the ladder back to the wall it was left hanging down about 2 feet, while on December 24, 1929, it was hanging down into

that when the truck backed around the fire escape the latter part of the escape was pulled out from the building, with the back end of the ladder facing east, the ladder being 5 feet from the ground, and was left in that position; when the ladder of the building and one woman immediately thereafter pulled the ladder as near as they could to the wall and left it hanging from

It also appears that on evening of December 24, 1935, one John Watson visited the premises in the rear of the building and saw a fire escape 60 or 75 feet east and on the north side of the alley attached to the rear building, hanging from into the alley 5 or 10 feet from the building wall; the ladder was was about 7 feet from the top of the surface of the alley.

It further appears that on about 7 a.m., December 25, 1935, while standing on driving his truck 10 feet high with a covered top, in a westerly direction to the alley he noticed, and that about 75 to 100 feet in the alley, the top of the truck struck against the ladder of a fire escape, which extended itself to the top of his truck; that he climbed to the top of his truck and while endeavoring to release the ladder, a moving attached to the ladder struck him on both his legs. His helper then came up and aided him in freeing the truck from the fire escape. At the time in question it was dark and there was no light of any kind on the fire escape.

It does not appear from the record as to how the fire escape was placed at the time of the alleged striking of it by the truck "about Christmas time," nor does it appear as to which fire escape the truck struck, and there is no evidence that the fire escape was against the truck when the same fire escape was struck "about Christmas time," and the record indicates that when the ladder was Watson pulled the ladder back to the wall it was left hanging from

the alley 8 or 10 feet from the wall, 7 feet from the top of the surface of the alley, but there is no evidence in the record tending to show what caused it to be 8 or 10 feet from the wall and 7 feet from the surface of the alley.

Under this state of the record we are of the opinion that the verdict of the jury is against the manifest weight of the evidence. The judgment of the municipal court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

The alley is 10 feet from the wall; 7 feet from the top of the
 surface of the alley, but there is no evidence in the report
 relating to how much ground it is 10 feet from the wall
 and 7 feet from the surface of the alley.

Under this case of the report we are of the opinion that
 the verdict of the jury is against the evidence weight of the
 evidence. The judgment of the municipal court is reversed and
 the cause is remanded.

REVEREND AND HONORABLE

Commissioner and District, 11th, corner.

35942

HERMAN A. LANGE,
(plaintiff),
Appellee,

v.

CITY OF CHICAGO HEIGHTS,
(defendant),
Appellant.

134 A
APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

267 I.A. 621⁴

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Herman A. Lange brought an action against the defendant to recover damages for personal injuries resulting from a fall upon a defective sidewalk negligently maintained by the municipality. The trial resulted in a verdict in favor of plaintiff for \$6,500; plaintiff remitted \$2,500 and judgment was entered against the defendant for \$4,000. To reverse this judgment defendant prosecutes this appeal.

The declaration charges that on July 31, 1930, and long prior thereto defendant, a municipal corporation, was possessed of, and had control of a certain public sidewalk extending in an easterly and westerly direction midway between Illinois street and Hickory street, on the south side of said street; that it was the duty of said city to maintain said public sidewalk in good and safe repair and condition; that sixty days prior to July 31, 1930, it carelessly and negligently permitted a portion of said sidewalk about ten feet east of Halsted street, alongside a certain building known as 1721 Halsted street, in said city, to be and remain in bad and unsafe condition and dangerous for the use of persons lawfully using same, in that it had a hole or opening equipped with a cover or door, which said cover or door was old, weak and decayed and insufficiently

1934

HELMAN A. LANGRISH
(Plaintiff)

vs.

CITY OF CHICAGO
(Defendant)
Appellant.

COURT OF COMMONS

IN RE: PETITION FOR WRIT OF HABEAS CORPUS

Herman A. Langrish was arrested on the 1st day of

to recover damages for personal injuries resulting from a fall upon
a defective sidewalk negligently maintained by the municipality.

The trial resulted in a verdict in favor of plaintiff for \$2,500.

Plaintiff received \$2,500 and judgment was entered against the

defendant for \$4,000. To reverse this judgment defendant presented

this appeal.

The decision was reversed on July 21, 1934, and jury

tried these defendants, a municipal corporation, was presented at

and had control of a certain public sidewalk extending in an

easterly and westerly direction midway between Illinois street and

Nichols street, on the south side of said street; that it was the

duty of said city to maintain said public sidewalk in good and safe

repair and condition; that sixty days prior to July 21, 1934, it

negligently permitted a portion of said sidewalk along

the foot end of Halsted street, alongside a certain building known

as 1733 Halsted street, in said city, to be and remain in bad and

unsafe condition and dangerous for the use of persons lawfully using

said sidewalk; that it had a hole or opening equipped with a cover or door

supported and was liable to break when stepped upon, all of which the defendant in the exercise of ordinary care should have known; that plaintiff passing upon said sidewalk and exercising due care and caution for his own safety, stepped upon said cover, which suddenly broke or gave way, causing him to be thrown through said opening, etc.; that on November 6, 1930, and within six months of the happening of the accident, notice was served on the city attorney and on the city clerk of the City of Chicago Heights, containing the statement in writing giving plaintiff's name as the person injured, the name and residence of plaintiff, the date and about the hour of the accident, the place or location where such accident occurred and the name and address of his attending physician. The defendant filed the general issue.

It is contended that the plaintiff was not in the exercise of ordinary care at the time of the accident. The material facts are that on July 31, 1930, plaintiff was a carpenter, his place of business for 19 months before the accident being at 1627 Halsted street, Chicago Heights, three doors south of where the accident occurred; the sidewalk where he was injured runs east and west adjacent to a building known as the Salvation Army Building. There was an opening in the sidewalk three feet by eleven feet, covered over with two heavy car doors which overlapped, the west door having been misplaced. These doors were not fastened to the sidewalk but were supported in the middle by a cross timber. Immediately to the north of the door between the curb and the edge of the doors was a concrete strip of sidewalk two feet in width. The defendant has actual notice of the defects, and knew the condition of the cover over the areaway was very poor, it appearing that four or five months before the accident the boards had been removed from the

approved and was liable to have been stopped when it was
 the defendant in the matter of which was found
 that plaintiff passed upon with plaintiff and defendant was
 and plaintiff for his own safety, which was with plaintiff, which
 suddenly broke on Gave way, causing him to be thrown through said
 opening, etc.; that on November 6, 1935, and within six months of
 the happening of the accident, notice was served on the City of Chicago
 and on the City Clerk of the City of Chicago, containing the
 statement in writing giving plaintiff's name as the person injured,
 the name and residence of plaintiff, the date and hour and hour of
 the accident, the place or location where such accident occurred and
 the name and address of the attending physician. The statement
 that the plaintiff made.

It is contended that the plaintiff was not in the exercise
 of ordinary care at the time of the accident. The material facts
 are that on July 21, 1935, plaintiff was a carpenter, his place of
 business for 15 months before the accident being at 1837 West
 Street, Chicago Heights, three hours south of where the accident
 occurred; the sidewalk where he was injured was new and was
 adjacent to a building known as the Madison City Building. There
 was no opening in the sidewalk three feet by three feet, which
 was with the board was found which was placed in the road having
 been misplaced. These boards were not fastened to the sidewalk but
 were supported in the middle by a cross timber. Immediately to
 the north of the hole between the curb and the edge of the board
 was a concrete strip of sidewalk two feet in width. The defendant
 had actual notice of the defect, and knew the condition of the
 street over the street was very poor, it appearing that soon after
 another before the plaintiff the defect was been removed from the

opening at various times and that the building inspector of the City of Chicago Heights had been notified of that fact on several occasions prior to July 31, 1930. On the date of the accident, a clear, bright day, about 3 p. m., plaintiff for the first time, never having seen the covering over the opening before, and not knowing the west door had been misplaced, was walking on the sidewalk from the east to the west, carrying on his shoulder a box of tools weighing 70 lbs., and when he arrived at the middle of the areaway the doors gave way and suddenly tipped forward and he was thrown down into the opening. The argument in support of this contention appears to be that because plaintiff had his place of business for 19 months prior to the accident, three doors south of where the accident occurred and because he did not choose to walk on the two-foot concrete strip between the curb and the edge of the doors he failed to observe the care and caution which an ordinarily careful man would have used under the circumstances. We cannot concur in this view and are unable to discover any merit in this contention. The mere fact that plaintiff had his place of business as stated and might have taken a better and safer sidewalk than the one he did take does not charge him with want of care (City of Aurora v. Hillman, 90 Ill. 61, 65), but it is a question of fact for the consideration of the jury. (Lovenguth v. City of Bloomington, 71 Ill. 238; Town of Normal v. Bright, 125 Ill. App. 478, 481; Horaburda v. City of Chicago, 154 Ill. App. 627, 630.) In City of Mattoon v. Faller, 217 Ill. 273, where the identical question was raised, the court said (p. 281):

"It is, however, well settled law in this State, that, where a man knows of a defect in a sidewalk and walks thereon, his doing so with such knowledge is not negligence per se, as matter of law. The fact, that he goes upon the sidewalk with knowledge of the existing defect, is a circumstance to be taken into consideration by the jury with all the other facts and circumstances in determining the question, whether he was guilty of contributory negligence. The same is true as to the fact that he might have taken another route to reach his destination than the one which he actually pursued."

Counsel's next contention is that the defendant was not guilty of any negligence, notwithstanding plaintiff fell by reason of stepping upon a covering of the arcaway which was improperly supported, counsel arguing that the defect was latent and not apparent from casual inspection. We think the evidence is to the contrary. Defendant knew the doors were loose and placed upon the sidewalk without any fastening, and it had not only constructive, but actual notice of these defects. The law applicable to the instant case was announced in Sherwin v. City of Aurora, 168 Ill. App. 320, where (on page 324) it was said:

"A city owes to those in the exercise of due care for their own safety, the duty to exercise ordinary care to keep its streets in a reasonably safe condition for use; that is, such care as a reasonably prudent person would exercise under the same or similar circumstances. When the city permits adjacent property owners to excavate a portion of its streets, and to construct passageways under the same, it cannot escape liability by saying it owes no duty to the citizen who properly uses them. If the city permits such use of the street, which otherwise would be safe for travel, it must exercise such diligence as would be required of a reasonably prudent person under all the circumstances."

See also City of Sterling v. Thomas, 60 Ill. 264; Brennan v. City of Streator, 236 id. 468, 471; City of Mattoon v. Faller, 217 id. 273, 280. In our opinion this record clearly discloses that the defendant did not exercise reasonable diligence to keep the sidewalk in a reasonably safe condition, but on the contrary, there was an utter disregard of such duty.

It is also claimed that the court erred in overruling defendant's motion to find the defendant not guilty, at the close of all the evidence. We do not think so. The question of negligence on the part of the defendant and that of contributory negligence on the part of plaintiff were properly submitted to the jury as a question of fact.

It is finally contended that the judgment is excessive. It appears that at the time of the accident plaintiff was about 53 years old, in good health, a carpenter by trade and engaged in

Counsel's next contention is that the defendant was not guilty of any negligence, notwithstanding the fact that the

of stepping upon a covering of the runway which was improperly supported, caused a spring that the defect was latent and not apparent from casual inspection. We think the evidence is to the contrary.

Defendant says that there was no defect in the aircraft without any testing, and it had not only constructive, but actual notice of these defects. The law applicable to the instant case was announced in Wright v. City of New York, 100 Cal. 292, 33 P. 2d 1001 (on page 332) it was said:

"A city owes no duty to those in the control of the aircraft to test its own aircraft, the duty to exercise ordinary care to keep its aircraft in a reasonably safe condition for use is not such care as a reasonably prudent person would exercise under the same or similar circumstances. When the city permits aircraft property to be used on a public highway, it assumes a duty to exercise a reasonable degree of care to keep the highway in a reasonably safe condition for use. It is not a duty to the aircraft which property would be used on a public highway, which otherwise would be under its control, it must exercise such diligence as would be required of a reasonably prudent person under all the circumstances."

See also City of Berkeley v. Brown, 60 Cal. 2d 1001, 38 P. 2d 1001 of 1962, 100 Cal. 2d 1001, 38 P. 2d 1001, 100 Cal. 2d 1001, 38 P. 2d 1001.

97, 280. In our opinion this theory clearly discloses that the defendant did not exercise reasonable diligence to keep the aircraft in a reasonably safe condition, but on the contrary, there was an after thought of each duty.

It is also claimed that the court erred in overruling defendant's motion to find the defendant not guilty, at the close of all the evidence. We do not think so. The question of negligence on the part of the defendant was not of a contributory negligence on the part of plaintiff was properly submitted to the jury as a question of fact.

It is finally contended that the judgment is excessive.

the general contracting business, earning not less than \$75 a week, and that since the accident he has been unable to do heavy work; that he received a deep laceration on the lower left jaw requiring four sutures to close up, and eight of his natural teeth were knocked out; that he suffered a good deal of abdominal distress; his scrotum was swollen and discolored, and there was a rupture between the fourth and fifth ribs on the right side of the cartilage; he had pains in his chest and down in his groin and that he still feels the pain; that ten weeks elapsed before he was able to return to work.

After carefully considering the evidence we have reached the conclusion we would not be justified in holding that the damages are excessive.

Finding no reversible error the judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

The general condition of the patient was such that it was not possible to do any work, and that since the accident he has been unable to do heavy work; that he received a deep laceration on the lower left jaw requiring four sutures to close up, and eight of his natural teeth were broken out; that he suffered a good deal of concussion of the brain; that his condition was swollen and discolored, and that there was a rupture between the fourth and fifth ribs on the right side of the chest; that he had pains in the chest and down in his groin and that he still feels the pain; that two weeks elapsed before he was able to return to work.

After carefully considering the evidence we have before us the committee would not be justified in holding that the defendant was responsible for the injury to the plaintiff.

Respectfully,
J. H. [Name]

35948

HARPER MOULTON,
(plaintiff),
Appellee,

v.

NATIONAL BUILDERS AGENCY,
Inc., a corporation,
(defendant),
Appellant.

1357
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 621²⁻

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Action was brought by plaintiff, Harper Moulton, against defendant, National Builders Agency, Inc., for commissions. Tried before a jury. Verdict and judgment in favor of plaintiff for \$1660.75, from which the defendant appealed.

The statement of claim sets forth that plaintiff is an insurance broker; that March 15, 1930, he was employed by defendant to solicit life insurance; that defendant agreed to pay plaintiff as commissions fifty per cent of the first year's premiums, and five per cent on each year's premiums from the second to the tenth years, of any and all insurance secured; that about April 1, 1930, defendant gave plaintiff the names of J. Samuel Lafferty and Henry Pfutzenreuter as likely prospects for life insurance; that these prospects placed applications for insurance for \$50,000 each; that by reason of said agreement plaintiff is entitled to \$1660.75.

The affidavit of merits, sworn to by the president of the defendant corporation, alleged that plaintiff was employed to write and place insurance through the defendant, in the Builders Life Insurance Company and with no other concern, but denied that defendant agreed to pay fifty per cent of the first year's premium on any insurance secured by plaintiff with five per cent renewal

PLAINTIFFS:
(Plaintiff)
Defendant

v.

NATIONAL BUILDERS ASSOCIATION
INC., a corporation
(Defendant)
Appellant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

1931 I.A. 621

IN RE: PETITION FOR WRIT OF HABEAS CORPUS AND WRIT OF HABEAS AD REMOVAL

Action was brought by plaintiff, Eugene Hamilton, against defendant, National Builders Agency, Inc., for commission, based before a jury. Verdict and judgment in favor of plaintiff for \$100.00, from which the defendant appealed.

The statement of claim sets forth that plaintiff is an insurance broker; that since 1917, he has employed by defendant to solicit life insurance; that defendant agreed to pay plaintiff as commission fifty per cent of the first year's premium, and five per cent on each year's premium from the second to the tenth year, if any and all insurance secured; that about April 1, 1927, defendant and Guye plaintiff the names of J. Samuel Lattery and Henry Lattery as life insurance for life insurance that would guarantee placed application for insurance for \$50,000 each; that by reason of said agreement plaintiff is entitled to \$100.00.

The affidavit of motion, sworn to by the president of the defendant corporation, alleged that plaintiff was employed to write and place insurance through the defendant, in the Builders Life Insurance Company and with no other concern, and denied that defendant agreed to pay fifty per cent of the first year's premium

thereof, and that it agreed to pay such commissions upon any insurance written on the life or lives of any prospects called upon by him whether or not the application was actually obtained by him, and denied that plaintiff had obtained applications for insurance from Lafferty and Pfutzenreuter, or that he was instrumental or aided in or was the procuring cause of such insurance.

The first reason urged for a reversal of the judgment is, that the court should have instructed the jury to find for the defendant because the proofs failed to show that one Zimmerman was authorized to enter into the contract claimed to have been entered into between plaintiff and defendant. We are unable to concur in this contention for the reason that plaintiff made out a prima facie case.

Plaintiff's evidence discloses that he is an insurance broker and defendant is the general agent for the Builders ^{Life} Insurance Company; that Roy P. Zimmerman is secretary of the defendant and one of its organizers and its representative in all its business transactions; that in the early part of 1930, Zimmerman employed plaintiff to solicit insurance, plaintiff to receive fifty per cent of the first year's premiums regardless of whether the insurance was written in the Builders Life Insurance Company or other companies, and regardless of whether the closing was done by plaintiff or through Zimmerman; that the names of Lafferty and Pfutzenreuter were given to plaintiff by Zimmerman; that plaintiff called upon and reported to Zimmerman that he had sold them the insurance. Policies aggregating \$50,000 were issued upon the life of Henry Pfutzenreuter in five companies and also \$50,000 upon the life of Lafferty in three companies; that the premiums thereon were paid for one year and that fifty per cent of the premiums is \$1660.75.

Defendant's version is that defendant is the general

thereof, and that it agreed to pay such commission upon any insurance written on the life or lives of any persons called upon by him whether or not the application was actually obtained by him, and denied that plaintiff had obtained applications for insurance from defendant and defendant, or that he was instrumental or aided in or was the procuring cause of such insurance.

The first reason urged for a reversal of the judgment is, that the court should have instructed the jury on the fact that defendant because the goods failed to show that one defendant was authorized to enter into the contract claimed to have been entered into between plaintiff and defendant. It was unable to connect in this connection for the reason that plaintiff was not a proper party case.

Plaintiff's evidence discloses that he is an insurance agent and defendant is the general agent for the defendant's company; that Mrs. D. defendant is secretary of the defendant and one of its organizers and its representative in all its business transactions; that in the early part of 1900, defendant assigned plaintiff to solicit insurance, plaintiff to receive fifty per cent of the first year's premium regardless of whether the insurance was written in the defendant's life insurance company or other companies, and regardless of whether the agent was one of plaintiff or defendant; that the names of plaintiff and defendant were given to plaintiff by defendant; that plaintiff called upon and reported to defendant that he had sold them the insurance. Policies aggregating \$50,000 were issued upon the life of Henry defendant in five companies and also \$50,000 upon the life of plaintiff in three companies; that the premium thereon was paid for one year and that fifty per cent of the premium is \$1500.75.

agent of the Builders Life Insurance Company; that plaintiff called at the offices of defendant and had a conversation with Zimmerman, secretary of the defendant and of the Builders Life Insurance Company, in which conversation Zimmerman told plaintiff he would give him sixty-five per cent of the first year's business and five per cent for nine years on business of the Builders Life Insurance Company; that nothing was said about plaintiff writing business through the defendant for any other company or that defendant would pay fifty per cent for all business written and placed with other companies; that Zimmerman sent plaintiff to see Lafferty and Pfutzenreuter and endeavor to sell them insurance of the Builders Life Insurance Company; that in September, 1930, Lafferty called on defendant and said he was considering a policy of \$50,000 for himself and \$50,000 for Pfutzenreuter; that Zimmerman tried to interest him in the idea of taking out life insurance in the Builders Life Insurance Company; that several days later plaintiff was told by Zimmerman that Lafferty and Pfutzenreuter were going to take out \$50,000 but not in the Builders Life Insurance Company, and that plaintiff replied he would see Lafferty's attorney and may be sell him the Builders Life Insurance; that the policies were issued but not in the Builders Life Insurance Company and that Zimmerman personally received the commission.

The question raised upon a motion to direct a verdict raises the question whether there is any evidence tending to sustain the plaintiff's side of the issue, and if there is evidence that clearly tends to support the plaintiff's case it must be submitted to the jury. It is a question of law whether there is any evidence tending to prove the allegations of the plaintiff's declaration, and it is a question of fact, where there is such evidence, whether it is sufficient to sustain such allegations. The former is a question for the court; the latter a question for the jury, subject to revision

[illegible]

by the court on motion for a new trial. Therefore the court may not properly take the case from the jury and direct a finding for the defendant when there is some evidence tending to prove every essential allegation of the plaintiff's declaration, merely because, in the judgment of the court, the weight of the evidence in support of some material allegation is not sufficient to sustain a verdict for the plaintiff. If the evidence in support of the plaintiff's allegations is sufficient to make a prima facie case, the court is not authorized to direct a verdict for the defendant because of evidence of contrary facts tending to an opposite conclusion. On the motion to direct a verdict only that evidence can be considered which is in favor of the party against whom the motion is directed, and that evidence must be considered in the light most favorable to that party, together with all legitimate inferences which may be drawn from it in his favor. (Shannon v. Nightingale, 231 Ill. 168, 175, 176.) Furthermore, it will be noted that in the affidavit of merits no claim was made that Zimmerman was not authorized to enter into the contract; on the contrary, it is admitted that the plaintiff and defendant did enter into a contract but the defense was that the plaintiff was employed to write and place insurance through the defendant in the Builders Life Insurance Company. (Rule 15 (a) of the Municipal court of Chicago.) Under such circumstances the point can not be urged as a ground for reversal.

The only other error assigned and argued by the defendant is that the court admitted improper evidence and that plaintiff's counsel made prejudicial remarks before the jury in that Zimmerman while testifying was asked, and was permitted to answer over objection, if the defendant and the Builders Life Insurance Company had interlocking relationships so far as the board of directors were concerned. He answered, yes. The witness before the question was propounded had testified that he was secretary of the defendant

of the court on motion for a new trial. Therefore the court may
not properly take the case from the jury and direct a finding for
the defendant when there is some evidence tending to prove guilt.
The court's ruling in the plaintiff's favor, under the
weight of the court, the weight of the evidence in support
of some material allegation is not sufficient to sustain a verdict
for the plaintiff. If the evidence in support of the plaintiff's
allegations is sufficient to make a prima facie case, the court is
not authorized to direct a verdict for the defendant because of
evidence of contrary facts leading to an opposite conclusion. The
motion to direct a verdict only if the evidence can be considered
which is in favor of the party moving when the motion is denied,
and that evidence must be considered in the light most favorable
to that party, together with all legitimate inferences which may be
drawn from it in his favor. (Anderson v. Minneapolis, 226 U.S. 295,
132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

as well as the Builders Life Insurance Company and that both companies occupied the same suite of offices. During this examination counsel for plaintiff stated, "I want to show their own stockholders wouldn't buy a policy in their own company." No objection was made to the remark of counsel, but the court of its own motion stated: "We are not trying out the integrity of the insurance company. Improper remarks of counsel will be stricken out." Neither the rulings of the court nor the remarks of counsel under the circumstances would warrant a reversal of the judgment.

We have considered and answered all of the points raised and argued by the defendant and conclude that the errors assigned would not warrant a reversal of the judgment. It is, therefore, affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

as well as the Builders Life Insurance Company and the Life Insurance Company
insured the same under of policies. During this examination counsel
for plaintiff stated, "I want to show that my client's policy was
not a policy in their own company." The objection was made to the
tendency of counsel, but the court of its own motion refused to
not trying and the integrity of the insurance company. In reply to
counsel of counsel will be shown that "Within the walls of the
court now the records of counsel under the circumstances would permit

a review of the judgment.

To have considered and reviewed all of the points raised
and argued by the defendant and counsel for the state admitted
would not require a review of the judgment. It is sufficient
affirmed.

11/10/1911.

Revised and signed by the court.

35954

IRENE PATTERSON,
(plaintiff),
Appellant,

v.

THE PEOPLES TRUST & SAVINGS
BANK OF CHICAGO, a corporation,
(defendant), Appellee.

136 H
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 621⁵

MR. PRESIDING JUSTICE KROGER DELIVERED THE OPINION OF THE COURT.

Irene Patterson sued defendant in assumpsit to recover \$600 paid defendant as part of the purchase price for a certain bond. There was a trial by the court without a jury, resulting in a finding and judgment for defendant. To reverse this judgment the plaintiff appealed.

The statement of claim alleged plaintiff entered into an agreement in writing with defendant whereby she agreed to purchase and the defendant agreed to sell and deliver one Mid-Co Petroleum Company First Mortgage 3% Serial Sinking Fund Bond; that she agreed to pay for same in monthly installments until \$970 had been paid; that she paid defendant \$600, the last payment having been made on September 22, 1921; that on October 22, 1921, she tendered defendant \$100, which it refused to accept, stating that the bonds were of no value, the company having gone into receivership; that she made demand of the repayment to her of the \$600. Defendant's affidavit of merits denied plaintiff had made a tender of \$100 on October 22, 1921, and alleged that after September 22, 1921, plaintiff refused to pay the installment due on the contract and averred that plaintiff refused after September 22, 1921, to make further payments because the bond had depreciated in value. Defendant also pleaded the statute of limitations requiring such actions to be

(continued from page 6)

400.5332 63 22503

THE BUREAU OF THE ARMY
DEPT. OF THE ARMY
(Continued)

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

the plaintiff's account.

The statement of claim alleges that

an agreement in writing with the United States and the Government of the Republic of the Philippines.

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that she agreed to pay tax when an installment installment would \$1500
and been paid; that she paid defendant \$400, the last payment having
been made on September 28, 1921; that on October 22, 1921, the defendant
of defendant \$100, which is refused to accept, stating that the bonds
were of no value, the company having gone into receivership; that
the made demand of the repayment to her of the \$400. Defendant's
affidavit of merits denied plaintiff had made a demand of \$100 on
September 22, 1921, and alleged that after September 22, 1921, plaintiff
refused to pay the installment due on the contract and agreed
that plaintiff refused after September 22, 1921, to make further

brought within five years.

The undisputed evidence discloses that the contract by which plaintiff agreed to purchase the bond is dated April 22, 1921, and by it she agreed to purchase and the defendant agreed to sell the bond mentioned in the statement of claim. An initial payment of \$100 is acknowledged by the agreement and the contract provided that plaintiff should thereafter make monthly payments of \$100 until \$970 was paid. The bond was to be delivered upon payment of the final installment, due January 22, 1922. Plaintiff paid the installment due September 22, 1921, having prior thereto paid \$500; that October 22, 1921, she went to the bank and was told that defendant could not take any more money on the contract; that the Mid-Co Petroleum Company was in financial difficulties and the bond was worthless. It further appeared that plaintiff testified that she knew it would be to her disadvantage to make further payment and demanded the \$600 she paid defendant be returned to her.

In the view we take of this appeal the only question involved is whether the action is barred by the Statute of Limitations. It will be noted there is no provision in the contract in any way referring to the return of any money paid under the contract and that this is not a suit to enforce the contract. Defendant's liability to plaintiff, if any existed, was upon an implied promise to refund the money paid, arising out of the wrongful conduct of the defendant in breaching its agreement, that being the sole basis of the action. (Wheeler v. Mather, 56 Ill. 241, 246; Boston v. Clifford, 68 id. 67; Highway Commissioners v. Bloomington, 253 id. 164; The People v. Sumner, 274 id. 637, 641; Skinner v. Mulligan, 56 Ill. App. 47, 50; Vanselow v. Bender, 175 Ill. 460, 463.)

Section 15, Ch. 83, Cahill's Illinois Revised Stats.

(Statute of Limitation), provides: "Actions on unwritten con-

through which the money was paid.

The evidence further discloses that the contract was

which plaintiff agreed to purchase the land in 1921, 1922, 1923,

and by it she agreed to purchase and the defendant agreed to sell

the land mentioned in the statement of claim. An initial payment

of \$100 is acknowledged by the agreement and the contract provided

that plaintiff should thereafter make monthly payments of \$100 until

\$1000 was paid. The land was to be delivered upon payment of the

total installment, due January 28, 1928. Plaintiff paid the install-

ment due September 22, 1921, having prior thereto paid \$200; that

October 22, 1921, she went to the bank and was told that defendant

would not take any more money on the contract; that the \$100-00

defendant Company was in financial difficulties and the bank was

therefore. It further appeared that plaintiff learned that she

could not be so her disadvantage to make further payment and

demanded the \$100 and paid defendant he returned to her.

In the view we take of this appeal the only question

involved is whether the action is barred by the Statute of Limitations.

It will be noted there is no provision in the contract in any way

referring to the return of any money paid under the contract and that

this is not a suit to enforce the contract. Defendant's liability

is plain, if not stated, was upon an implied promise to return

the money paid, arising out of the wrongful conduct of the defendant

in procuring the agreement, and being the basis of the action.

Plaintiff v. Defendant, 66 Cal. 2d, 441, 442, 443, 444, 445, 446, 447

Plaintiff v. Defendant, 66 Cal. 2d, 441, 442, 443, 444, 445, 446, 447

Plaintiff v. Defendant, 66 Cal. 2d, 441, 442, 443, 444, 445, 446, 447

Plaintiff v. Defendant, 66 Cal. 2d, 441, 442, 443, 444, 445, 446, 447

Section 10, Cal. Civ. Code, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 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2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 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2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061, 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tracts, expressed or implied, * * * and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." In the instant case there was no promise to pay the money sued for, but the liability of defendant was one implied by law, and the action comes within the provision of section 15, ch. 83, supra, and is barred if not commenced within five years after the cause of action accrued. (Mowatt v. City of Chicago, 292 Ill. 578; Knight et al. v. St. L., L. M. & S. Ry. Co., 141 id. 110; Herweek v. Rhodes, 34 N. W. (2nd) 32; Thomas v. Pacific Beach Co., 115 Cal. 136, 139.)

The statute begins to run from the time when the cause of action arises thereon and the bar is complete at the expiration of the statutory period. In the instant case plaintiff's counsel asserts that plaintiff's cause of action arose when she went to make the payment in October, 1921, and the defendant refused to accept it. The suit was commenced July 29, 1931, and as that is more than five years after the cause of action arose, the plaintiff's cause of action was barred.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

36013

UNION BANK OF CHICAGO,
administrator of the
estate of Curtis Wall,
deceased, (plaintiff),
Defendant in Error.

v.

CITY OF CHICAGO, a municipal
corporation, (defendant),
Plaintiff in Error.

1377
BRANCH TO SUPERIOR COURT,

COOK COUNTY.

267 I.A. 621^A

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought under the statute by Union Bank of Chicago, as administrator of the estate of Curtis Wall, deceased, against City of Chicago, a municipal corporation, and Athey Truss Wheel Company, for wrongfully causing the death of Curtis Wall. During the trial the plaintiff dismissed the suit as to the Athey Truss Wheel Company. The cause was tried before a jury and plaintiff recovered a judgment against the City of Chicago for \$3,500. To reverse this judgment the City of Chicago sued out the present writ of error.

No question is raised as to the state of the pleadings. The plaintiff's declaration, consisting of one count, charged that it was the duty of the City of Chicago to maintain its streets in a reasonably safe condition and that it negligently failed to do so, and for a period of more than three months had permitted many large and deep holes to be and remain in said street which were dangerous to persons and traffic rightfully in the use of said street; that on August 9, 1929, Curtis Wall, a minor 12 years of age, became a passenger on the truck of Athey Truss Wheel Company, and while in the exercise of due care for his own safety was travelling

OFFICE BANK OF CHICAGO
ADMINISTRATOR OF THE
Estate of Curtis Wall,
(Deceased)
SOLICITORS IN LAW

DEPT. OF FINANCE, A MUNICIPAL
CORPORATION, (Deceased)
SOLICITORS IN LAW

IN SENATE

CHICAGO

1891

THE FOLLOWING IS THE HISTORY OF THE CASE:

This was an action on the case brought under the statute
by James Kane of Chicago, an administrator of the estate of Curtis
Wall, deceased, against City of Chicago, a municipal corporation,
and also Kane Trust Company, its successor under the law
of Curtis Wall. During the trial the plaintiff claimed the sum
of \$100,000 as the value of the Kane Trust Company. The case was tried before a
jury and plaintiff recovered a judgment against the City of Chicago
for \$2,500. To reverse this judgment the City of Chicago moved and
the present writ of error.

The question is raised as to the state of the plaintiff's
case. Plaintiff's case is based on the fact that the City of Chicago
is now the City of Chicago to maintain its streets in
a reasonably safe condition and that it negligently failed to do
so and for a period of some three months had permitted very
large and deep holes to be and remain in said street which were
dangerous to persons and traffic especially in the use of milk
trucks. On August 9, 1890, Curtis Wall, a minor is known
at law, became a shareholder on the stock of Kane Trust Company.

eastward on Lake street, Chicago, Illinois, said truck ran into one of said holes, thereby causing a great bump, which dislodged and threw plaintiff's testate off of said truck and into the street and the wheels of said truck passed over his body, whereby he received wounds from which he died on August 10, 1929, leaving him surviving his father, mother, two brothers and a sister.

Plaintiff in error offered no testimony and the facts as disclosed from the evidence of the witnesses for the defendant in error, are that for seven or eight months, or even longer, prior to the accident the pavement on Lake street near Ashland avenue, Chicago, Illinois, had many large and deep holes; that about noon August 9, 1929, an automobile truck belonging to Athey Truss Wheel Company was travelling easterly on Lake street and when it arrived at Robey street, the deceased, who was then 12 years of age, and seven or eight other boys jumped upon the truck and rode east toward Ashland avenue. It was a low body Ford with the sides about 18 inches high; that after the deceased boarded the truck he went forward and sat on the side of the truck with his left leg inside and his right leg outside of the truck, about two feet from where the chauffeur sat, and when the truck was near Ashland avenue the right front wheel struck a hole about one foot in width and six inches deep, causing a bump and the deceased fell off the truck, the rear wheel running over him, causing him severe injury from which he died the following day.

The plaintiff in error does not claim that the pavement in Lake street at the place of the accident was not badly out of repair and that it had been in this condition for a long time prior to the accident. The only reasons presented by plaintiff in error for the reversal of the judgment are (1) that the court erred in refusing to instruct the jury to return a verdict in favor of

...on Lake Street, Chicago, Illinois, said that two days
 one of said bodies, thereby causing a great bump, which dislodged
 and threw Plaintiff's female off of said truck and into the street
 and the wheels of said truck passed over his body, whereby he re-
 ceived wounds from which he died on August 10, 1939. Leaving him
 surviving his father, mother, two brothers and a sister.

Plaintiff in error offered no testimony and the facts
 as disclosed from the evidence of the witnesses for the defendant
 in error, are that the body of said woman, at the instant, prior
 to the accident the government on Lake Street was driving westward,
 Chicago, Illinois, had many large and deep holes that about noon
 August 9, 1939, an automobile truck belonging to John Thomas Cook
 Company was traveling easterly on Lake Street and when it arrived

at Robert Street, the deceased, who was then 19 years of age, and
 seven or eight other boys jumped upon the truck and rode west toward
 Robert Street. It was a hot day and the children were in

hurry to get off the truck and the deceased, being the last to get off
 and sat on the side of the truck with his left leg inside and his
 right leg outside of the truck, about two feet from where the
 chauffeur sat, and when the truck was near Oakland Avenue the right
 front wheel struck a hole about one foot in width and six inches
 deep, causing a bump and the deceased fell off the truck, the truck
 then running over him, causing him severe injury from which he died

the following day.
 The plaintiff in error does not claim that the government
 is liable as to the place of the accident was not bodily out of
 sight and that it had been in this condition for a long time prior
 to the accident. The only person presented by plaintiff in error
 for the recovery of the judgment was (2) that the court erred in

plaintiff in error at the close of defendant in error's case, and (2) that the verdict and judgment are against the manifest weight of the evidence.

The argument in support of these contentions is that because the defendant was riding in the truck with one foot hanging over on the outside he was guilty of contributory negligence. The rule is well settled in this State that if there is in the record any evidence from which, if it stood alone, the jury could find, without acting unreasonably in the eye of the law, that all the material allegations of the declaration have been proved, a verdict could not be directed. (Libby, McNeill & Libby v. Cook, 222 Ill. 206; Vail v. Graham, 259 Ill. App. 172, and cases cited.) All that the evidence tends to prove, and all just inferences to be drawn from it in defendant in error's favor must be conceded to it. The evidence most favorable to defendant in error must be taken as true. The credibility of the witnesses, the weight of the testimony and the inferences to be drawn from the facts proved are all questions for the jury to pass upon and not for the court to decide. (Kelly v. Chicago City Ry. Co., 283 Ill. 640, 642; Molloy v. Chicago Rapid Transit Co., 335 id. 164, 169.) Whether evidence tends to prove contributory negligence is a question of law; whether a plaintiff as a matter of fact is guilty of contributory negligence is a question of fact for the jury. The court can determine adversely to the plaintiff only when no other conclusion can be reasonably drawn from the evidence that is favorable to the plaintiff. What is due care depends on the facts and circumstances in each particular case. The only requirement of the law, applicable to the facts in the instant case, is that the conduct of the deceased should be consistent with what a person of his age, intelligence, capacity, discretion and experience would do in like circumstances for the safety of his

person. (Hartnett v. Boston Store of Chicago, 265 Ill. 331, 336, and cases cited.) The mere fact that the deceased, a lad of 12 years of age, was riding in the truck with one foot hanging over on the outside does not charge him with want of care as a matter of law, as the culpability of a child between the ages of 7 and 14 is an open question of fact and must be left to the jury to determine, taking into consideration the age, capacity, intelligence and experience of the child. (Deming v. City of Chicago, 321 Ill. 341, 343.) Applying these rules to the instant case we are of the opinion the question whether the deceased was in the exercise of due care at the time of the accident was one of fact and was properly submitted to the jury.

It is also argued that the duty of plaintiff in error to maintain its streets in a reasonably safe condition applies only to those who are lawfully thereon; that the deceased jumped and was riding upon the truck without permission and it therefore owed him no duty. We cannot concur in this view. As this accident happened in a public street he was not a trespasser so far as the plaintiff in error is concerned. (Ellis v. City of Chicago, 247 Ill. App. 128, 130, and cases cited; City of Austin v. Schlagel, 257 S. W. 239.) Substantially the identical argument was made in City of Chicago v. Keefe, 114 Ill. 222, and in disposing of the question the court said, relative to the use of streets, (p. 227):

"They are to be kept in repair as streets, and, by necessary implication, for all the purposes to which streets may be lawfully devoted. We assume as self-evident that, with us, streets are open to the use of the entire public, as highways, without regard to what may be the lawful motives and objects of those traversing them, - that those using them for recreation, for pleasure, or through mere idle curiosity, so that they do not impinge upon the rights of others to use them, are equally within the protection of the law while using them, and hence equally entitled to have them in a reasonably safe condition with those who are passing along them as travelers, or in the pursuit of their daily avocations."

And continuing on p. 228:

... (Exhibit A, ...) ...
... The more fact that the deceased, a fact of 12 ...
... was riding in the truck with one foot hanging over ...
... on the outside door not through his with hand of care as a matter of ...
... fact, as the culpability of a child between the ages of 7 and 14 is ...
... as upon question of fact and was to be left to the jury to determine, ...
... taking into consideration the age, capacity, intelligence and ...
... (Exhibit A, ...) ...
... Applying these rules to the instant case we are of the ...
... opinion the evidence whether the deceased was on the ...
... one side at the time of the accident was one of fact and was ...
... properly submitted to the jury.

It is also argued that the duty of plaintiff in error is ...
... maintain the streets in a reasonably safe condition applies only to ...
... those who are ...
... riding upon the street without permission and is therefore not ...
... no duty. ...
... in a public street he was not a trespasser so far as the liability ...
... in error is concerned. (Exhibit A, ...) ...
... and cases cited; ...
... (Exhibit A, ...) ...
... and in disposing of the question

the court will ...
... They are to be held in regard to ...
... liability, for all the purposes to which ...
... devoted. ...
... to the use of the public ...
... may be the ...
... that those ...
... this ...
... to the ...
... them, and ...
... the ...

"Indeed, the rule seems to be, that although a party may be doing an unlawful act at the time he is injured through the negligence of another, this will not prevent a recovery, unless the act is of such a character as would naturally tend to produce the injury."

After a careful examination and consideration of the evidence, we are of the opinion the jury were warranted in finding the plaintiff in error guilty.

Finding no reversible error the judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

"I'm glad," she said, "that you are so interested in the work of the National Council on Education for the Physically Handicapped. It is a very important organization and it is doing a great deal of good for the physically handicapped."

the district in every respect.

Chinese as vegetables enter the legend is allowed

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NUMBER 447, 1974, 100 PAGES

36027

EDWARD H. MORRIS, Receiver for the
Binga State Bank, a corporation,
(Plaintiff) Appellant,

vs.

ADELBERT H. ROBERTS, Sr.,
(Defendant) Appellee.

387
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

267 I.A. 621⁵

MR. PRESIDING JUSTICE ALDER DELIVERED THE OPINION OF THE COURT.

On September 29, 1931, a judgment by confession for \$2018.75 was entered on a note executed by defendant, dated December 20, 1926, for \$1,500, due six months after its date, payable to the Binga State Bank, which on petition of defendant was opened and he was given leave to appear and defend, the judgment to stand as security. March 4, 1932, there was a trial before the court without a jury, resulting in a finding in favor of defendant and the judgment of September 29, 1931, was vacated, the suit dismissed and a judgment for costs was rendered against the plaintiff. To reverse this judgment plaintiff prosecutes this appeal.

Defendant's affidavit of merits did not deny the execution or delivery of the note, but alleged in substance that one Jesse Binga, and not plaintiff, was the true owner of the note.

The undisputed evidence discloses that plaintiff is the receiver of the Binga State Bank, a banking corporation; that the note involved was executed by the defendant and is payable to the Binga State Bank; that after its execution the defendant delivered it to a Miss Cantey, the auditor of the Binga State Bank; that after plaintiff was appointed receiver of the bank he brought the note in court. On the trial the plaintiff introduced the note in evidence and rested. Thereupon the defendant testified that on December 14, 1929, Jesse Binga transferred to him 10 shares of the capital stock of the Binga State Bank, and defendant became and continued to act as one of the board of directors of the bank until

KNOW

EDWARD R. MOORE, Defendant
State of New York, Plaintiff

VS.

ADOLPH E. MOORE, Defendant
(Defendant's Appellee)

367 I.A. 621

THE FOLLOWING JUDICIAL DECISIONS ARE CITED BY THE COURT.

On September 25, 1931, a judgment by confession for \$200.00 was entered on a note executed by defendant, dated September 15, 1931, for \$1,500, due six months after its date, payable to the Kings State Bank, which on petition of defendant was ordered and he was given leave to appear and defend, the judgment to stand as a nullity. March 4, 1932, there was a trial before the court at which a jury, resulting in a finding in favor of defendant and the judgment of September 25, 1931, was vacated, the said judgment was a judgment for costs was rendered against the plaintiff. It appears that judgment finally rendered was against.

Defendant's affidavit of merits did not deny the execution or delivery of the note, but alleged it was void and was void, and not plaintiff, was the true owner of the note.

The undisputed evidence discloses that plaintiff is the receiver of the Kings State Bank, a banking corporation; that the note involved was executed by the defendant and is payable to the Kings State Bank; that after its execution the defendant delivered it to a Miss Lantry, the mother of the Kings State Bank; that after plaintiff was appointed receiver of the bank he brought the note in court. On the trial the plaintiff introduced the note in evidence and rested. Thereupon the defendant testified that on December 14, 1931, he was transferred to his position of the cashier of the Kings State Bank, and defendant became and

it was closed by the Auditor of Public Accounts of the State of Illinois; that from the date of the execution of the note until judgment was entered thereon no demand had been made on him to pay same, nor was any mention made of the existence of the note in any meeting of the board of directors of the bank; that prior to signing the note he talked to Jesse Binga about the note.

Jesse Binga testified that he had been president of the Binga State Bank from 1921 to 1932; that he had the note in his private safe at the bank and at no time delivered it to anyone representing the bank.

Richard B. Mickey testified he was cashier of the bank after the election of 1930 until the bank closed; that it was his duty to have possession of the notes of the bank and that this note was never in his possession.

It was upon this record that the court held plaintiff was not entitled to judgment on the note.

The plaintiff seeks to reverse the judgment on the ground that the judgment of the court is contrary to law and the evidence. We think there is merit in this contention. Unless the defendant has a defense to the note it is a matter of no consequence who is the equitable owner of the note. Upon this record we would not be warranted in holding that the defendant has shown any defense to the note. The evidence clearly discloses that the note is payable to the Binga State Bank and that plaintiff is the legal holder thereof, and his possession is evidence that the debt mentioned in the note is an existing liability to the person in possession of the note, entitled to receive payment thereof. (Elvin v. Wuchetich, 326 Ill. 285, 286, and cases cited.) A suit on a promissory note is properly brought in the name of the person in whom the legal title of the note is vested, and it is a matter of no consequence, so far as the defendant is concerned, who may be the equitable owner if he has no

it was closed by the Auditor of Public Accounts of the State of Illinois; that from the date of the execution of the note until judgment was entered thereon no demand had been made on him to pay same, nor was any mention made of the existence of the note in any meeting of the board of directors of the bank; that prior to signing the note he talked no longer than usual with the bank.

James H. Hays testified that he had been president of the Chicago State Bank from 1921 to 1932; that he had the note in his private safe at the bank and at no time delivered it to anyone representing the bank.

Richard A. Hickey testified he was cashier of the bank after the election of 1930 until the bank closed; that it was his duty to have possession of the notes of the bank and that this note was never in his possession.

It was upon this record that the court held plaintiff was not entitled to judgment on the note.

The plaintiff seeks to reverse the judgment on the ground that the judgment of the court is contrary to law and the evidence. We think there is merit in this contention. Unless the defendant has a defense to the note it is a matter of no consequence who is the equitable owner of the note. Upon this record we would not be troubled in holding that the defendant has shown any defense to the note. The evidence clearly discloses that the note is payable to the Chicago State Bank and that plaintiff is the legal holder thereof, and his possession is evidence that the debt mentioned in the note is an existing liability to the person in possession of the note, entitled to receive payment thereof. (*Wright v. Wagoner*, 230 Ill. 325, 326, and cases cited.) A note on a promissory note is properly brought in the name of the person in whom the legal title of the note is vested, and it is a matter of no consequence, so far as the

defense to it (Caldwell v. Lawrence, 84 Ill. 161; McHenry v. Ridgely, 3 Ill. 309, 310), but this is true only where the defendant has no defense as against the equitable owner. (Feulner v. Ollam, 211 Ill. App. 348.)

The instant case was decided by the trial court solely upon the theory that the note was the property of Jesse King, which fact we do not decide. Under the circumstances and for the reasons stated, we have concluded that justice would be best served by a re-trial of the case.

The judgment of the Municipal court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

[illegible]

The instant case was decided by the trial court solely upon the theory that the note was the property of James Kings, which fact we do not dispute. Under the circumstances and for the reasons stated, we have concluded that justice would be best served by a reversal of the case.

THE UNIVERSITY OF CHICAGO

35827

ARTHUR W. ARENTSEN,
Plaintiff in Error.

v.

SHERMAN TOWEL SERVICE CORPORATION,
a corporation, ERNEST L. BYFIELD,
EUGENE BYFIELD and FRANK W. BERING,
Defendants in Error.

ERROR TO SUPERIOR

COURT, COOK COUNTY.

267 I.A. 622

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error, sued out on January 20, 1932, it is sought to reverse a decree of the superior court, entered January 21, 1930, wherein the court, following the recommendations of the master, found that in equity and good conscience the complainant, Arentsen, was not entitled to the relief prayed for in his bill, and further found that cross-complainant, Sherman Towel Service Corporation (hereinafter called the Company) was entitled to the relief prayed for in its cross-bill, and adjudged that Arentsen's bill be dismissed for want of equity; and further adjudged that Arentsen should within 10 days execute and deliver to the company "a good and valid assignment of the stock certificate for 2-1/2 shares" of the capital stock of the company, "now standing in the name of said Arentsen," and that upon Arentsen's failure to make said assignment a certain master in chancery do so in Arentsen's name; and further adjudged that the costs of the suit be taxed at the sum of \$473.75, that Arentsen pay to the company said sum as costs, and that in default of such payment it have execution against him, etc.

On July 5, 1932, it appearing that subsequent to the entry of the decree in the superior court Eugene Byfield had

1000

STATE OF NEW YORK
IN SENATE

1933

REPORT OF THE
COMMISSIONER OF THE
DEPARTMENT OF TAXATION
AND FINANCE
FOR THE YEAR
1932

ALBANY: J.B. LIPPINCOTT COMPANY, 1933.

BY this way of error, and on January 20, 1933,

it is sought to reverse a decree of the superior court, entered

January 20, 1933, wherein the court, following the recommendation

of the master, found that in equity and good conscience the

complaint, respondent, was not entitled to the relief prayed for

in his bill, and further found that respondent's complaint, respondent

Travel Service Corporation (hereinafter called the company) was

entitled to the relief prayed for in the cross-bill, and adjudged

that respondent's bill be dismissed for want of equity and further

adjudged that respondent should retain its equity interest and deliver

to the company "a good and valid assignment of the stock

constituting for 2-1/2 shares" of the capital stock of the company.

"now standing in the name of said respondent," and that upon respondent's

"failure to make said assignment a certain number of shares to be

in respondent's name; and further adjudged that the costs of the suit

be taxed at the sum of \$175.75, that respondent pay to the company

said sum as costs, and that in default of such payment it have

execution against him, etc.

On July 2, 1933, it appearing that respondent to the

departed this life, his death was suggested, and it was here ordered that the present writ of error proceed as to all other defendants in error.

In Arentsen's original bill, filed on March 11, 1929, the parties defendant were the Company, Ernest L. Byfield (individually and as president of the company), Eugene Byfield (individually and as treasurer) and Frank W. Bering (individually and as secretary). The relief prayed was that "a decree be entered directing defendants and each of them to issue and deliver to your orator 25% of the capital stock" of the company within a short day to be fixed by the court.

In the bill Arentsen alleged in substance that he and the three individual defendants were the original incorporators of the Company, an Illinois corporation, duly incorporated on May 12, 1927; that it was organized for the purpose of furnishing to hotels, clubs, apartment houses and other buildings "a service, including towels, soap and other articles;" that its capital stock was \$1,000, consisting of 10 shares of common stock of no par value; that the three individual defendants subscribed for 2-1/2 shares each, and he (Arentsen) also subscribed for 2-1/2 shares; that the first board of directors were Ernest L. Byfield, Frank W. Bering and himself (Arentsen); that it immediately entered upon the business for which it was incorporated, with principal office in Chicago, and has since continued in that business; that he (Arentsen) was made general manager of the business of the company, and thereafter expended his best efforts in expanding its business, rendering valuable services, until about September 7, 1928, when he was discharged; that during all of this time he was the owner of 25% of its capital stock, that largely through his efforts its

reported this life, his death was suggested, and it was here stated
that the present was of great interest as to all other defendants
in case.

In connection with the original bill, filed on March 21, 1934, the
parties defendant were the company, listed in Exhibit (Indefinite)
and as president of the company, Eugene Hyatt (Indefinite) and
as treasurer, and Frank J. Hyatt (Indefinite) and as secretary.
The relief prayed was that "a decree be entered dissolving the company
and each of them as partners and assign to your order all of the
capital stock" of the company within a short day to be fixed by the
court.

In the bill complaint alleged in substance that he had
the three individual defendants were the original defendants
of the company, an Illinois corporation, duly incorporated on
May 22, 1934, that it was organized for the purpose of conducting
a hotel, club, apartment house and other business "in Chicago
including hotels, room and other subjects" that the capital stock
was \$1,000, consisting of 10 shares of common stock of no par

value, that the three individual defendants subscribed for 3-1/2
shares each, and he (complainant) also subscribed for 3-1/2 shares
that the first board of directors were named J. Hyatt, Frank J.
Hyatt and himself (complainant); that it immediately entered upon
the business for which it was incorporated with principal office
in Chicago, and has since continued in that business; that he
(complainant) was made general manager of the business of the company,
and thereafter expended his best efforts in expanding the business,
producing valuable business, with annual revenues of \$1,000, when
he was discharged; that during all of this time he was the owner
of all of the capital stock, that largely through his efforts the

assets and business have increased in value, that he is entitled to have said 25% of the capital stock issued to him, but that the company, by its officers and agents, have at all times neglected and refused so to do; that he is unable to determine the exact value of the stock so owned by him; that he is not indebted to the company; and that if upon the hearing it shall appear that he is justly indebted to the company in any sum he hereby offers to do equity and pay to it said sum.

In the joint and several answer of the Company and the three individual defendants they admitted the Company's organization as a corporation, its capital stock, object, etc., as alleged, and that complainant was one of the incorporators and a subscriber of one-fourth of its capital stock; denied that complainant as manager had rendered any valuable services to the company, but admitted that he was discharged from his employment about September 7, 1928, and alleged that "said discharge was done in pursuance of a certain contract * * hereinafter more fully set forth." Defendants further admitted that during all the time that complainant acted as manager he was the owner of 25% of the company's capital stock, but denied that its assets and business had increased in value largely through his efforts, and averred that when he was discharged the company was insolvent and had a deficit of \$30,335. Defendants further admitted that they had neglected and failed to issue to complainant any stock of the company, denied that the value of the stock can not be determined, and averred that from a true and correct audit of the company's books and affairs, prepared by a firm of public accountants, it appears that the company's shares of stock are "wholly worthless," due to said deficit of \$30,335. Defendants further averred that complainant was indebted to the Company in

...and business have increased in value, that he is entitled
to have sold all of the capital stock issued to him, but that the
company, by its officers and agents, have at all times neglected
and refused so to do; that he is unable to determine the exact
value of the stock so owned by him; that he is not indebted to the
company; and that if upon the hearing it shall appear that he is
financially indebted to the company in any way he hereby offers to so
settle and pay to it said sum.

In the joint and several answer of the company and the
three individual defendants they admit the company's organization
as a corporation, its capital stock, subject, etc., as alleged, and
that complaint was one of the defendants and a defendant at
the time of the capital stock; denied that complaint as manager
and rendered any valuable services to the company, but admitted that
he was discharged from his employment about September 7, 1908, and
alleges that "said discharge was made in pursuance of a certain
contract" - nevertheless says that said contract was not
written but during all the time that complaint acted as manager
he was the owner of 25% of the company's capital stock, and denied
that the assets and business had increased in value largely through
his efforts, and averred that when he was discharged the company
was insolvent and had a deficit of \$20,000. Defendants further
admitted that they had rendered and failed to render to complaint
any assets of the company; denied that the value of the stock was
not as claimed, and averred that from a true and correct audit
of the company's books and effects, prepared by a firm of auditors
accountants, it appears that the company's assets of stock are
"greatly diminished," due to said deficit of \$20,000. Defendants
further averred that complaint was indebted to the company in

the sum of \$1910 "for cash loaned" to him by it at various times ending August 20, 1928, and that complainant "is bound in law to assign his said stock to the company," because of certain provisions of a contract (copy attached) between the Company and complainant, entered into about the time of the Company's incorporation.

This contract (introduced in evidence by defendants on the hearing before the master) is between the Company, as first party and complainant as second party, is signed and sealed by the parties and bears date of May 2, 1927. It appears from the evidence that it was not actually signed and delivered until shortly after the Company had been incorporated on May 12, 1927. The signature of the Company is by Ernest L. Byfield, its president. Material parts of the contract are as follows:

"WHEREAS, the Company is desirous of extending the business in which it is engaged, and particularly of developing the same, in furnishing to hotels, office buildings, clubs apartment houses and other buildings, a service including towels, soap, and other toilet articles which it may desire to furnish from time to time; and WHEREAS first party is desirous of employing said Arentsen as its general manager for such purposes; and WHEREAS said Arentsen possesses particular ability in the line of work for which the company desires to employ him, and he is willing to be employed by it for said purposes; and WHEREAS said Arentsen is now the owner of 25% of all the outstanding stock of the company; * *

NOW, THEREFORE, IT IS AGREED:

FIRST. The Company does hereby employ said Arentsen as general manager for a period of one (1) year from the date of the execution hereof, and from year to year thereafter until this agreement is terminated by the action of the board of directors of the company, which termination may take place at any time after the first year of employment hereunder, with or without cause.

SECOND. Said Arentsen does hereby enter into the employment of first party, and does further agree to devote his zeal, energy and attention to its affairs and to promote its business to the best of his ability. It is understood and agreed * * that said Arentsen is now engaged in the textile business and that he may devote a portion of his time, energy and attention to said textile business so long as it does not interfere with the efficient and successful management of the business and affairs of the Company. Said Arentsen does agree that when the business and best interests of the Company demand his entire

time and attention he will cease to conduct said textile business upon the request of the board of directors of the Company, and upon failure to do so this agreement may be terminated at any time after demand is made upon said Arentsen. * *

THIRD. It is mutually agreed * * that said Arentsen shall receive no salary or other compensation of any kind whatsoever for his services to the company other than dividends upon stock owned by him.

FOURTH. * * Said Arentsen hereby agrees that the capitalization of the Company may be increased from time to time as the owners of a majority of the outstanding capital stock may deem advisable, and does hereby agree to vote his stock * * in favor of any and all increases of capital stock as the same may be proposed from time to time.

FIFTH. (Provided that if the capital stock is increased Arentsen may subscribe to 25% of the increased stock, and be assisted in paying for the same by the Company procuring for him a loan. As no increase of the stock was made, the provisions of the paragraph are not now material.)

SIXTH. Said Arentsen does hereby agree that he will not sell his stock, or any part thereof which may be owned by him from time to time, while he is in the employ of the Company, or after his employment with the Company has been terminated, to any person or corporation other than the Company or the HOTEL SHERMAN COMPANY, unless and until he has notified the Company and the HOTEL SHERMAN COMPANY of his desire to sell said stock and has given the Company and/or the HOTEL SHERMAN COMPANY an opportunity to exercise the option hereinafter given by said Arentsen. And said Arentsen does hereby give to said Company and/or to HOTEL SHERMAN COMPANY the right and option, for a period of ninety (90) days from the time that he shall cease to be in the employ of the first party, or from the time of his giving notice of his desire to sell his stock or any part thereof, to purchase from him his stock or any part thereof, at the book value thereof as the same appears on the books of the first party. In determining the book value no allowance is to be made for good will, nor for contemplated or future profits upon any contracts between said first party and its customers. Subject to the conditions contained in this PARAGRAPH SIXTH, said book value shall be determined from an audit made by auditors designated by and meeting the sole approval of said first party and/or HOTEL SHERMAN COMPANY. In the event that the Company and/or the HOTEL SHERMAN COMPANY shall not exercise its option within ninety (90) days as hereinbefore provided, said Arentsen shall have the right to sell his stock or any part thereof to any person, partnership or corporation whatsoever, subject, however, to the terms and conditions of this agreement, and to the terms and conditions of any voting trust agreement, as hereinafter provided.

SEVENTH. Said Arentsen agrees that he will whenever requested by the Company enter into a Voting Trust Agreement with HOTEL SHERMAN COMPANY to continue so long as said Arentsen shall remain in the employ of said first party, and/or he will execute and re-execute proxies as often as the same may be necessary, and deliver the said proxies to said HOTEL SHERMAN COMPANY, or any person or persons designated by said HOTEL SHERMAN COMPANY, - all for the purpose of enabling said HOTEL SHERMAN COMPANY to have the control of and to exercise the voting power of all of the stock which said Arentsen may from time to time be the owner of upon the stock transfer books of said first party, and that he will from time to time endorse all stock certificates, which may be issued to him, in blank, and deliver the same to said HOTEL SHERMAN COMPANY, or to such other person or corporation as may be

and that provision be will agree to contribute with families business upon the payment of the bond of \$100,000.00 to the company, and that the payment of this amount may be distributed as follows: -

THIRD. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

FOURTH. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

FIFTH. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

SIXTH. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

SEVENTH. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

EIGHTH. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

NINTH. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

TENTH. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

ELEVENTH. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

Twelfth. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

Thirteenth. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

Fourteenth. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

Fifteenth. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

Sixteenth. It is mutually agreed that the company shall have no right or interest in the company after the date of the agreement, and that the company shall have no right or interest in the company after the date of the agreement.

designated in said Voting Trust Agreement; provided, however, that no action shall be taken under the terms of said Voting Trust Agreement which shall abrogate, nullify or modify the contract, or any of the terms hereof. Said Voting Trust Agreement shall be in a form to be approved by the HOTEL SHERRMAN COMPANY and/or its counsel; provided that nothing contained therein shall abrogate, nullify or modify this contract or any of its terms. (The evidence does not disclose that any Voting Trust Agreement ever was entered into.)

EIGHTH. All certificates of stock of said Company shall bear a legend across the face thereof, reciting that said certificate, and the shares represented thereby, are held by their respective owners subject to all of the terms and conditions of this said contract. A copy of this contract shall be filed with the Secretary and transfer agent of this Company."

Defendants in their answer further alleged that the services rendered by complainant to the company, after its incorporation, "were unsatisfactory"; that on September 4, 1928, the company discharged complainant from its service, giving him notice thereof, and that its action in so doing "was entirely in accordance with the terms of said written contract * * and particularly paragraph first thereof;" that thereafter on September 13, 1928, the Company in writing "requested complainant to choose a firm of auditors or public accountants for the purpose of determining the book value of the shares of its stock," that complainant failed and refused to make such a choice, and that thereafter the company secured the services of a firm of reputable and licensed public accountants to make an audit of the books of the Company and to determine the book value of its shares of stock; that said firm of accountants, under date of October 30, 1928, made a written report of their findings; that said report disclosed that the Company had a deficit of \$30,335.37; and that its said shares of stock were "wholly worthless," and had "no market value;" and that on November 20, 1928, the Company notified complainant in writing "of the facts disclosed by said audit." A copy of this written notification is attached to the bill as an exhibit. It is dated November 20, 1928, is addressed to complainant, is signed by the Company, by Ernest

L. Byfield, and is as follows:

"We wish to advise you that in accordance with our letter to you of September 13, 1928, a firm of impartial and competent auditors, Mcovell, Wellington & Co., were employed to audit the books of the Sherman Towel Service Corporation in order to determine the book value of your shares or interest in the corporation. You will recollect that in our letter of September 13, 1928, we asked you to choose your auditors to determine the book value of the shares or interest in said Sherman Towel Service Corporation, and that if you did not take such action we would employ a reputable firm to make such audit, and would advise you at the completion of the audit in reference to their report and tender to you the price for your shares or interest established by said audit. On your failure to select an auditor we employed the firm of Mcovell, Wellington & Co. to make such audit.

This firm has now completed its audit covering the period of May 11, 1927 to August 31, 1928. This audit shows no value whatever for such stock or interest in stock that you may have, but in fact shows a deficit of \$30,335. This report is at our office and can be examined by you at any time. Nevertheless, we herewith tender a nominal consideration of \$100 for an assignment and release of all rights and interests that you may have in stock of said corporation or demands against the corporation. We herewith enclose form of such assignment and release for your signature."

Defendants in their answer further alleged that complainant refused to accept said \$100, and refused and still refuses to comply with his said agreement (i.e., the written agreement bearing date of May 2, 1927, above set forth) and to surrender and/or assign to the Company his said stock or interest in the Company, although it has always been ready to pay said sum of \$100 and to fully perform its part of said written agreement whenever complainant shall release and assign to it all his right, title and interest in said shares of stock. And defendants denied that complainant was entitled to the relief as prayed in his bill, or any relief.

On the same day (April 15, 1929) that defendants filed said answer, the Company filed a cross-bill, in which it prayed that Arentsen (cross-defendant) "may be decreed specifically to perform the said agreement, entered into with your orator as aforesaid, and to make a good and sufficient assignment to your orator of said shares of stock - your orator being ready and willing, and hereby offering specifically to perform the said

agreement on its part." In the cross-bill the written agreement is set forth as an exhibit and the allegations are substantially the same as in defendants' answer to the Arentsen's bill.

Thereafter Arentsen filed his answer to the cross-bill in which he denied that the services rendered to the Company by him as manager were unsatisfactory; denied that the Company had the right, for a period of 90 days after he had severed his connection with it, to purchase his stock in the Company at the book value as the same appears on the Company's books; alleged that if such a right existed "it is inequitable, unjust and a fraud upon his rights," and that "any such agreement pertaining thereto is null and void for want of mutuality;" denied that the Company had a deficit of \$30,336, or any deficit; denied that the shares of stock owned by him were wholly worthless or had no market value; denied that he was indebted to the Company in the sum of \$1916 "for cash loaned;" denied that any proper audit of the Company's books had been made; and denied that the Company is entitled to purchase from him his said stock under the terms of said written agreement.

On the hearing before the master considerable oral and documentary evidence was introduced. Arentsen testified in his own behalf as did several witnesses for him. The principal witnesses in behalf of defendants and cross-complainant (the Company) were Ernest L. Byfield, president of the Company and also of the Hotel Sherman Company, and F. H. McMullen, an accountant in the employ of the firm of accountants of McNeill, Wellington & Co., which at the Company's request had made an audit of the company's books during September and October, 1926, and delivered a written report thereof to the Company, which report was admitted in evidence.

Arentsen's testimony was to the effect that during

attestation of the fact. In the statement the witness attested
 is set forth as an exhibit and the allegations are substantially
 the same as in statement, except in the statement's bill.
 Therefore, evidence taken from the statement
 is taken in evidence that the witness admitted in the company in
 his testimony were material. He testified that the company had not
 failed, for a period of 10 days after he had received the statement
 with it, to produce his stock in the company at the time when he
 the same appears on the company's books. He testified that it was a
 right alleged "it is inadmissible" except that a check upon the
 company, and that "any such statement concerning the stock is only
 and void for want of authenticity," testified that the company had a
 deficit of \$50,000, or any deficit, testified that the shares of stock
 owned by him were wholly worthless or had no market value. He testified
 that he was indebted to the company in the sum of \$100,000 and
 testified "he did not pay any money at the company's stock but
 from time to time and testified that the company is entitled to produce from
 him his stock under the terms of his written statement.
 On the hearing before the master commissioner his oral testimony
 substantially agrees with statement. He testified that in his
 own belief as his several witnesses for him. The witnesses
 witness in behalf of defendant and cross-examination (the
 company) were heard in evidence. Testimony of the company was also
 of the United States company, and T. H. Hamilton, an accountant
 in the matter of the time of defendant's testimony, testimony
 of the fact of the company's records and what he said at the
 company's books during September and October, 1902, and testified
 a written report thereof to the company, which report was
 admitted in evidence.

January, 1927, he had numerous conferences with the three individual defendants concerning the organization and incorporation of the Company for the purpose of conducting a towel service business; that it was tentatively agreed that he was to act as manager of the business, giving his services without salary in consideration of having a 25% interest in the business, and that the three individual defendants were to furnish the necessary capital; that much preliminary work was done prior to the Company's incorporation; that an office was opened in the Hotel Sherman in Chicago at a rental of \$100 a month; that salesmen and other employees were hired; that purchases of toweling and other materials were made during February and March; that an autotruck was purchased; that the individual defendants did not put up any money, but that all purchases were made through the Hotel Sherman Company, and on its credit, and all items subsequently charged by it to the Company; that although the Company was not incorporated until May 12, 1927, it commenced serving its first customers early in April; that from February, 1927, until September 7, 1928, when he was discharged from his employment, he acted as general manager of the business, and "worked from 10 to 15 hours each day;" that he was a subscriber and owner of 25% of the stock of the Company, but never received any certificates therefor; that he was also the vice-president of the Company; that the two Syfields and Bering, although officers of the company, did not at any time work actively in the business; that the Company did not have its own laundry plant; that all of its laundry work was done in the laundry of the Hotel Sherman, and the Towel Company delivered the finished work to its customers; that all money collected from customers was turned over to the Hotel Sherman Co. and credited to the running account which it had with the Towel Company; that there was no definite arrangement with the Hotel Sherman Co. as to

January, 1937, he had numerous conversations with the three individuals
concerning the organization and incorporation of the
company for the purpose of conducting a hotel business.
That it was tentatively agreed that he was to act as manager of the
business, giving his services without salary in consideration of
having a 25% interest in the business, and that the three individuals
defendants were to furnish the necessary capital. That such an
arrangement was made prior to the company's incorporation; that
an office was opened in the Hotel Sherman in Chicago at a rental
of \$100 a month; that salesman and other employees were hired; that
purchase of traveling and other materials were made during February
and March; that an agreement was procured; that the individual
defendants did not put up any money, but that all business was
made through the Hotel Sherman company, and on the credit of
all three defendants; that by it in the company; that although
the company was not incorporated until May 12, 1937, it commenced
conducting its first business early in April, 1937, and continued
until November 7, 1937, when it was dissolved; that the agreement,
as stated in General Denial of the business, was "written" and
in the form of a "contract" that he was a shareholder and owner of 25% of
the stock of the company, but never received any certificates there-
of; that he was also the vice-president of the company; that the
two defendants and himself, although officers of the company, did not
do any work actively in the business; that the company did not
have the necessary funds; that all of the company's work was done
in the January of the Hotel Sherman, and the Hotel company delivered
the finished work to the defendant; that all money collected from
customers was turned over to the Hotel Sherman Co. and credited to
the running account which it had with the Hotel company; that

what it would charge the Towel Company for the laundry work "except that the work was to be done at cost plus a profit, but with the understanding that the price was to be strictly competitive with other companies doing similar work in a similar way, and that the price was not to exceed the competitive market price;" that when the venture was first started there was no business at all; that the witness and three other salesmen did the soliciting and that thereafter and until the witness' discharge the volume of business "increased from month to month at about the rate of 10 per cent per month;" that in July, 1928, the witness requested of Ernest Byfield that the Company issue certificates to him for the stock owned by him, and that Byfield replied that at a subsequent meeting of the directors the matter would be taken up; that about August 15, 1928, he made a similar request, and Byfield said that the matter would soon be adjusted, but that he (Arentsen) has never received any certificates for the stock owned by him; that about September 7, 1928, he received a letter from the Company stating that his services "were unsatisfactory" and that he was discharged from his position as manager; that he then left the Company's employ and that at that time it "had from six to eight hundred customers and was doing a business of approximately \$11,000 a month;" that, as regards the \$1910 cash, which from time to time was received by him from the Company, he arranged with Ernest Byfield and Bering that the same was to be charged to him on the Company's books, to be deducted subsequently from his profits from the business; that the price charged by the Hotel Sherman Co. for said laundry work exceeded the competitive market prices charged by other concerns doing similar work; and that he had numerous conferences with Ernest Byfield as to a reduction of said prices but that they

that it would change the level of the country and change
that the work was to be done in that a road, but with the
understanding that the price was to be strictly competitive with
other companies doing similar work in a similar way, and that the
price was not to exceed the competitive market price, that was the
understanding and that other witnesses did the same thing and that there-
after and until the witness' discharge the volume of business
increased from month to month at about the rate of 10 per cent
per month. That in July, 1933, the witness requested of Gylfe
Gylfe that the company issue certificates to him for the stock
owned by him, and that Gylfe replied that at a subsequent meeting
of the directors the matter would be taken up; that about August
15, 1933, he made a similar request, and Gylfe said that the
matter would soon be adjusted, but that he (witness) has never
received any certificates for the stock owned by him; that about
September 7, 1933, he received a letter from the company stating
that his services "were unnecessary" and that he was discharged
from his position as manager; that he then left the company's employ
and that to that time he had been paid in full for his services
and was doing a business of approximately \$11,000 a month; that he
regards the ratio small, which time he has not received by him
from the company, he continued with Gylfe and Gylfe that
the same was to be changed to him as the company's loss, he
detached subsequently from his duties from the business; that the
price charged by the Hotel Herman Co. for said laundry work
exceeded the competitive market price charged by other companies
doing similar work and that he had numerous conferences with
Gylfe and Gylfe as to a reduction of said prices but that they

never were reduced. Numerous witnesses called by complainant testified as to the excessiveness of the charges of the Hotel Sherman Co. for said laundry work as compared with the charges of competitive concerns doing similar work.

The testimony of Ernest G. Byfield, called by defendants and cross-complainant, did not in essential particulars contradict Arentsen's testimony. He did not state wherein the services of Arentsen as manager were "unsatisfactory". He testified that when the Company was incorporated no money was paid into its treasury by any of the subscribers of the stock; that Arentsen paid nothing for his stock; that neither he (Ernest Byfield), Eugene Byfield nor Bering "paid anything for the stock which we received;" that up to August 31, 1928, the Hotel Sherman Co. had disbursed or advanced for the Towel Co.'s account and benefit about \$56,000; that at the time of Arentsen's discharge the Towel Co. had not been run at a profit, but that at that time it "was doing a business of about \$10,000 a month;" and that it had many customers, of which he (Byfield) had procured "about 50 per cent."

Among the findings of the master, followed by similar findings in the decree, is the finding that "the services rendered by Arentsen to cross-complainant, under and pursuant to the aforesaid contract" (i.e., said agreement dated May 2, 1927, above set forth) "were unsatisfactory, in that from the beginning of business until Arentsen's said discharge (September 7, 1928) the Company's business was conducted at a loss." This finding is based solely upon the report of said accountants. Parts of said report are set forth in the master's report, including the balance sheet of the Company "as of August 31, 1928." This balance sheet is as follows:

There were several other witnesses called by the defense.

Testified as to the expenditures of the charges of the hotel.

Testified as to the fact that the company was not connected with the charges of

the company was doing similar work.

The testimony of James C. Hyatt, called by the defense

and cross-examination, did not in essential particulars contradict

the company's testimony. He did not state wherein the company of

the company was doing similar work. He testified that when

the company was incorporated he never was paid for his services

at any of the meetings of the company and that he never paid

for his stock and that he never received any dividends.

He testified that he never received anything for the stock which he received, and up

to August 21, 1922, the Hotel Sherman Co. had disbursed or advanced

for the Hotel Co.'s account and benefit about \$25,000; that at the

time of the company's disbursements the Hotel Co. had not been at a

profit, but that at that time it was doing a business of about

\$25,000 a month, and that it had many customers, of which he

testified had received "about 50 per cent."

Among the findings of the master, followed by similar

findings in the decree, is the finding that "the services rendered

of the company to cross-examination, under and pursuant to the above

and contract" (1922, said agreement dated May 2, 1922, above and

testified) "were unavailing to bring about the beginning of business

with the company's said contract (1922) the company's

business was conducted as a loss." This finding is based solely

upon the report of said accountants. None of said reports are set

forth in the master's report, including the balance sheet of the

company as of March 21, 1922. This balance sheet is as

"Assets"

Current Assets

| | | |
|---------------------------|---------------|-------------|
| Trade Accounts Receivable | \$12,826.06 | |
| Inventories | 2,180.97 | |
| A.W. Arentsen personal | <u>1,910.</u> | \$16,917.03 |

Fixed Assets

| | Cost | Depreciation | |
|-------------------|--------------------|-------------------|-------------|
| Auto trucks | \$4,641.57 | \$1,290.96 | |
| Fixtures or Equip | 7,537.64 | <u>828.71</u> | |
| | <u>\$12,229.21</u> | <u>\$2,119.67</u> | \$10,109.54 |

Preferred Charges

| | |
|--------------------------------|--------------------|
| Prepaid Insurance and Licenses | 371.42 |
| Total Assets | <u>\$27,297.99</u> |

Liabilities

Current Liabilities

| | |
|-----------------------------|--------------------|
| Hotel Sherman Company | \$56,463.44 |
| Accrued Commissions Payable | <u>1,169.92</u> |
| | <u>\$57,633.36</u> |
| Deficit | <u>30,335.37</u> |
| | <u>\$27,297.99</u> |

During the examination of cross-complainant's witness, F. H. McMullen, while explaining the report of said audit, he testified that, as to the item in the current assets "Inventories \$2,180.97," it included "coats, gowns, towels, etc.," then ready for service; that, however, "the coats, gowns and towels in service were valued at \$33,149.96;" that this merchandise had been "placed in service at various times;" that "in arriving at the assets of the Company the merchandise placed in service was entirely depreciated;" that "Mr. Bennington, who is connected with the firm by which I am employed, instructed me not to include as assets any of the material placed in service;" and that "in arriving at the total assets (\$27,297.99) I did not take into account the value of future contracts or contracts outstanding." It thus appears from said balance sheet, as of August 31, 1928, that if the total value of the merchandise in service had been included in the Company's assets no deficit would have been disclosed, even without considering the value of contracts outstanding. In explaining the item of "Current Liabilities \$57,633.36," the witness testified: "The liabilities include \$56,463.44 due to the Hotel Sherman Co., and

accrued commissions payable, \$1,109.92. The item due the Hotel Co. is for disbursements for purchases and charges for laundry service and interest on monthly balances. I only examined the charges made in the months of March and June, 1928. I did not examine the other months because my examination consisted only of a test check of the accuracy of the records and did not include a check of all of the transactions. The total charges for laundry service in March, 1928, was \$5,150.22, and in June, \$4,460.05. The total amount of the charges for laundry service made by the Hotel Sherman Co. from the inception of the business of the Towel Co. to August 31, 1928, was \$65,821.73. The books do not show the unit prices charged. Another witness called by cross-complainant was Elybert H. Andersen, the bookkeeper of the Towel Company. He testified that it appeared from the Company's books and records that "from May, 1927 to August 31, 1928, it purchased and placed in service Towels, linen and garments to the value of \$25,936.09;" and that during 1928, and up to August 31st, the total value of such merchandise purchased and placed in service was \$9,483.79. Considering the above evidence, as well as other evidence contained in the present transcript, we are of the opinion that the above finding of the master, followed by the court in the decree, is not sustained by the evidence. There is no evidence showing wherein complainant's services as manager "were unsatisfactory," and we think it sufficiently appears that the Company's business was that of an active, going concern, with its business increasing in volume from time to time, that from its inception and until complainant was discharged as manager in September, 1928, its business was not being "conducted at a loss," and that the capital stock of the Company had a considerable though uncertain value. It certainly

does not appear, as alleged in defendants' answer and as charged in the cross-bill, that said stock in September, 1928, was "wholly worthless." And we think it appears from all the evidence that complainant, though removed from his position as manager of the Company, is entitled to receive from the Company proper certificates of stock, evidencing his ownership of 25 per cent of the capital stock of the Company, which certificates although often requested never have been issued to him.

Another finding of the master, followed by the court in the decree, is that "when towels, etc., are placed in service, it is the universal and well recognized custom in Cook County, Illinois, to charge off as of no value towels and items of this nature so placed in service and furnished by towel service corporations doing business, and that such custom is due to the rapid depreciation of towels and other items so placed in service, and because of the fact that the same have no market value after being so once placed in service." This finding evidently is based upon the testimony of Austin E. Torney, cross-complainant's witness, a practicing lawyer in Chicago and secretary of a Linen Supply Association. He testified, over the objection of complainant, that there was a "practice" or "custom" among members of the particular association with which he was connected "to charge off to expense at about 100 per cent depreciation all linens, etc., put in service." His testimony did not disclose that there was any such "universal and well recognized custom in Cook County," and in our opinion the above finding of the master is not sufficiently sustained by the evidence. The witness also expressed the opinion that towels and linens after so being placed and continued in service "would have a value for six months."

Still another finding of the master, followed by the court in the decree, is that, "by the sixth paragraph of said

contract (i.e., the written agreement dated May 2, 1927, above set forth), it was expressly agreed between the cross-complainant Company and said Arentsen that said Company should have the right and option, for a period of 90 days next after Arentsen should cease to be in its employ, to purchase from Arentsen his stock in the Company, or any part thereof, at the book value thereof as the same appears on the books of the Company, and that in determining such book value no allowance should be made for good will or for contemplated or future profits upon outstanding contracts between the Company and its customers, and that such book value should be determined from an audit to be made by auditors designated by and meeting the approval of either said Company or the Hotel Sherman Co."

We do not think that such a finding is warranted by the terms of said sixth paragraph of said contract, particularly when taken in connection with all provisions of the contract. As we read the paragraph it is predicated on Arentsen's desire to sell his stock in the Company, and there is no evidence in the present record that at any time Arentsen ever expressed any desire to sell or dispose of his said stock. And we cannot construe the contract as giving the right to the Company of compelling Arentsen to sell his stock, especially under circumstances disclosing that, against his will and without any just cause, he was discharged from his position as general manager. Furthermore, we think that the provisions in said paragraph are unilateral and hence incapable of enforcement by the Company. Furthermore, we are of the opinion that the decree as entered by the court is inequitable, unconscionable and unjust. It is well settled that a decree for specific performance of a unilateral contract will not be entered.

(Corbett v. Cronkhite, 239 Ill. 9, 17; South Park Comr's v.

Chicago City Ry. Co., 236 id. 504, 509; Barker v. Hauberg,

(1.0.), the witness agreement dated May 2, 1937, above set
 forth. It was expressly agreed between the above-named
 company and said witness that said company should have the right
 and option, for a period of 60 days after business hours
 ceased to be in the employ, to purchase from American his stock in
 the company, at any price desired, at the book value shown on the
 same appears on the books of the company, and that in determining
 such book value no allowance should be made for good will or for
 contingent or future profits upon valuation made between
 the company and its customers, and that such book value should be
 determined from an audit to be made by auditors designated by and
 meeting the approval of either said company or the Hotel Sherman
 Corp. We do not think that such a finding is warranted by the
 facts of this paragraph of said contract, particularly when
 taken in connection with all provisions of the contract. As we
 read the paragraph in the question on American's dealing in real
 estate in the company, and there is no evidence in the present
 record that at any time American ever expressed any desire to sell
 or dispose of his said stock. And as counsel requested the court
 to give the right to the company to purchase American's stock
 his stock, especially under circumstances disclosed here, without
 his will and without any just cause, he was discharged from his
 position as general manager. Furthermore, we think that the
 provisions in said paragraph are well-considered and hence proper to
 enforcement by the company. Furthermore, we are of the opinion
 that the above is enforceable by the court as provided, unless
 the court is of the opinion that the contract is voidable for
 fraud and unjust. It is well settled that a contract for
 purchase of a real estate contract will not be enforced.

325 id. 538, 545.) And it is also well settled that a court of equity will not decree specific performance of a contract which is unconscionable, inequitable or unjust. (Barratt v. Geisinger, 179 Ill. 240, 249; Davies v. Kaiser, 230 id. 334, 340; Raginsky v. Lawler, 313 id. 441, 447.)

Inasmuch as no accounting is asked, either by complainant or cross-complainant in their respective bills, and as no cross-errors have been assigned by cross-complainant, we are not called upon to decide in this proceeding the question as to whether complainant is indebted to cross-complainant in the sum of \$1910, or in any sum.

Our conclusions are that the decree of the superior court of January 21, 1930, should be reversed and the cause remanded to the superior court with directions to enter a decree dismissing the cross-bill of the Sherman Towel Service Corporation for want of equity and granting the prayer of complainant's original bill. Such will be the order. All costs shall be paid by defendants in error.

REVERSED AND REMANDED WITH DIRECTIONS.

Kerner, F. J., and Scanlan, J., concur.

35875

ROSE SASSMAN,
Appellant,

v.

SAMUEL HELBERG and
SARAH HELBERG,
Appellees.

1487
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 622²

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

On November 24, 1930, a judgment by confession for \$2426.36, including interest and attorney's fees, was entered against defendants on 28 notes, each dated June 27, 1921, signed by defendants, payable to their order and by them endorsed and delivered to plaintiff. These notes were originally of a series of 37, of \$50 each, aggregating \$1850, and 9 of them, aggregating \$450, had been paid and cancelled. Note No. 10 was payable 10 months after date and the succeeding notes monthly thereafter. All notes bore interest at the rate of 6% per annum before maturity and 7% thereafter. On December 22, 1930, on defendants' motion, the court vacated the judgment as confessed, and gave leave to plaintiff to file an amended statement of claim and "to change the form of action from contract-confession to contract." Plaintiff's amended statement of claim thereafter was filed and each defendant filed an affidavit of merits thereto. Defendants also demanded a jury trial. Such a trial was had on January 20, 1932, at which plaintiff testified and two witnesses for her. She also introduced in evidence the 28 notes and other writings. At the conclusion of plaintiff's evidence, and after argument of opposing counsel, the court on the same day, on

1217

NOTICE
TO
CREDITORS

IN
RE
Estate of
JAMES M. HARRIS,
Deceased.

ALL PERSONS HAVING CLAIMS AGAINST
THE ESTATE OF JAMES M. HARRIS,
DECEASED,

207 L.A. 323

ARE HEREBY NOTICED TO PRESENT THEIR CLAIMS TO THE COURT,

ON NOVEMBER 22, 1933, AT THE COURT OF PROBATE FOR

SAN FRANCISCO COUNTY, CALIFORNIA, IN ORDER THAT THEY MAY

BE HEARD AND CONSIDERED IN CONNECTION WITH THE ESTATE OF

SAYED DECEASED, AND THAT THEY MAY BE HEARD AND CONSIDERED

IN CONNECTION WITH THE ESTATE OF SAID DECEASED.

THE COURT OF PROBATE FOR SAN FRANCISCO COUNTY, CALIFORNIA,

DOES HEREBY ORDER THAT ALL PERSONS HAVING CLAIMS AGAINST

THE ESTATE OF SAID DECEASED, SHALL PRESENT THEIR CLAIMS

TO THE COURT OF PROBATE FOR SAN FRANCISCO COUNTY, CALIFORNIA,

ON NOVEMBER 22, 1933, AT THE COURT OF PROBATE FOR

SAN FRANCISCO COUNTY, CALIFORNIA, IN ORDER THAT THEY MAY

BE HEARD AND CONSIDERED IN CONNECTION WITH THE ESTATE OF

SAYED DECEASED, AND THAT THEY MAY BE HEARD AND CONSIDERED

IN CONNECTION WITH THE ESTATE OF SAID DECEASED.

THE COURT OF PROBATE FOR SAN FRANCISCO COUNTY, CALIFORNIA,

DOES HEREBY ORDER THAT ALL PERSONS HAVING CLAIMS AGAINST

THE ESTATE OF SAID DECEASED, SHALL PRESENT THEIR CLAIMS

TO THE COURT OF PROBATE FOR SAN FRANCISCO COUNTY, CALIFORNIA,

ON NOVEMBER 22, 1933, AT THE COURT OF PROBATE FOR

defendants' motion, instructed the jury to return a verdict against plaintiff. Such verdict was returned and the present appeal followed.

In plaintiff's amended statement of claim, filed January 12, 1931, she alleged in substance that on June 27, 1921, she loaned to defendants the sum of \$1850; that to evidence and secure the indebtedness defendants on the same day executed and delivered to her the said 37 judgment notes; that the first nine notes of the series, aggregating \$450, were paid by defendants; that the remaining 28 notes were not paid when due; that said remaining notes, which are attached to the original statement of claim heretofore filed herein, are made a part of this amended statement of claim; that after said first nine notes had been paid defendants filed petitions in bankruptcy and thereafter each was adjudicated a bankrupt and subsequently was discharged; that defendants and each of them, on numerous occasions after said discharge, "promised plaintiff to pay the money due the plaintiff on the notes heretofore described;" that thereafter defendants and each of them on divers occasions paid to plaintiff "divers sums of money, namely, \$56;" that "by reason of said promises and payments," defendants and each of them became and are liable for the balance remaining due and unpaid on said notes, to-wit, the sum of \$1344, plus interest amounting to \$335.63, making the total amount due to plaintiff from defendants the sum of \$2,227.63, etc.

In the affidavit of merits of Samuel Helberg he admitted the execution of the notes as charged, but alleged in substance that on April 5, 1923, he filed a petition in bankruptcy, that said obligations to plaintiff were listed in the bankruptcy court, that he was discharged in bankruptcy on October 1, 1923, that by virtue of said bankruptcy proceedings he is not indebted to plaintiff in any sum upon said notes, and that "the obligations created by said notes ceased to exist by virtue of his said discharge in bankruptcy."

defendants' motion, submitted the day to return a verdict against plaintiff. Such verdict was returned and the payment agreed followed.

The plaintiff's amended statement of claim filed January 12, 1933, was alleged in substance that on June 27, 1932, the defendant to defendant the sum of \$1200; that an evidence and return the in- defendant defendant on the same day executed and delivered to her the said 27 judgment noted; that the first main notes of the entire of plaintiff \$1200, were paid by defendant; that the defendant 27 notes were not paid when they had remained notes, which are attached to the original statement of claim heretofore filed herein, are made a part of this amended statement of claim; that after said first nine notes had been paid defendant filed petition in bankruptcy and thereafter each was adjudicated a bankruptcy and subsequently was discharged; that defendant and each of them, on numerous occasions after said discharge, "promised plaintiff to pay the money and the plaintiff on the other hand never received." This defendant defendant and each of them on diverse occasions paid to plaintiff "divers sums of money, namely, \$500; that "by reason of said promises and payments," defendant and each of them became and are liable for the balance remaining due and unpaid on said notes, to-wit, the sum of \$1200, plus interest amounting to \$482.66, making the total amount due to plaintiff from defendant the sum of \$1682.66, etc.

In the affidavit of service of summons returned by plaintiff the execution of the notes as charged, was alleged in substance that on April 6, 1933, he filed a petition in bankruptcy, that said obligation to plaintiff were listed in the bankruptcy court, that he was discharged in bankruptcy on October 11, 1933, that by virtue of said bankruptcy proceedings he is not indebted to plaintiff in any sum upon said notes, and that "the obligations created by said

And he denied that "on any occasion subsequent to his said discharge he promised to pay to plaintiff the balance due on said notes."

In the affidavit of Sarah Helberg she alleged in substance that the amount of money (\$1830) evidenced by the notes was loaned by plaintiff to her husband, Samuel Helberg, at a time when affiant was living in Europe; that upon her arrival in this country and upon request she attached her signatures to the notes; that the notes had been given "in connection with a second trust deed on property which had been acquired by her husband," and that her said signatures on the notes were "only for the purpose of waiving whatever dower rights she had;" that she filed a petition in bankruptcy on February 13, 1924, "in which the alleged claim of plaintiff was scheduled;" and that she was discharged in bankruptcy on March 2, 1925, and that by virtue thereof "any obligations which existed on her part by virtue of her signatures on said notes ceased to exist." She denied that on any occasion subsequent to her discharge in bankruptcy she promised to pay to plaintiff the amount due on the notes, or that any time either prior or subsequent to said discharge she paid any monies to plaintiff.

From the allegations of plaintiff's statement of claim it appears that she sought a recovery from defendants of the balance due on the indebtedness, as evidenced by the notes sued upon, on the theory that after each defendant had been discharged in bankruptcy, each unconditionally promised to pay said balance notwithstanding said discharge. The present transcript discloses that plaintiff gave testimony, supported by that of two other witnesses, to that effect. It is the settled law of this State that the promise by which a discharged debt of a bankrupt is revived must be clear, distinct and unequivocal. (St. John v. Stephenson, 90 Ill. 32; Stern v.

and he denied that "on any occasion antecedent to his death" charges he promised to pay to plaintiff the balance due on said notes."

In the affidavit of Sarah Helberg she alleged in substance that the amount of money (\$1250) evidenced by the notes was loaned by plaintiff to her husband, Samuel Helberg, at a time when Helberg was living in Europe; that upon her arrival in this country and upon request she attached her signature to the notes; that the notes had been given "in connection with a second trust deed on property which had been acquired by her husband," and that her signature on the notes was "only for the purpose of giving whatever due rights she had;" that she filed a petition in bankruptcy on February 12, 1924, "in which she alleged that plaintiff was indebted," and that she was discharged in bankruptcy on March 2, 1925, and that by virtue thereof "any obligation which existed on her part by virtue of her signature on said notes ceased to exist." She denied that on any occasion antecedent to her discharge in bankruptcy she promised to pay to plaintiff the amount due on the notes, or that any time after such promise or agreement to make payment she paid any money to plaintiff.

From the allegations of plaintiff's statement of claim it appears that she sought a recovery from defendants of the balance due on the indebtedness, as evidenced by the notes sued upon, on the theory that after each defendant had been discharged in bankruptcy each unconditionally promised to pay said balance notwithstanding said discharge. The ground advanced by plaintiff that defendants gave testimony, suggested by that of one other witness, to that effect. It is the settled law of this state that the promise by which a discharged debtor of a bankruptcy is revived must be clear, distinct and unambiguous. (See John v. Steinmann, 90 Cal. 222, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

Smith & Co., 225 Ill. 430; Willette v. Cotherson, 3 Ill. App. 644; Cheney v. Barge, 26 Ill. App. 182; Wilson v. Chandler, 133 Ill. App. 622; Dressler v. Van Vliasingen, 195 Ill. App. 63.) In the Stern case, supra, our Supreme Court says (p. 436): "Manifestly, under all well considered authorities, the effect of the new promise revives the debt barred by the discharge. The original cause of action is not destroyed by the bankruptcy proceedings. The debt is revived on the original consideration. A debt discharged is not a debt paid, as the moral obligation remains and is held by all the authorities to be a sufficient consideration for a new promise. * * The debt is due in conscience though discharged in law. This moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt, gives a right of action."

After reviewing the pleadings in the present case and the evidence introduced by plaintiff we think that the trial court erred in instructing the jury at the close of plaintiff's case to return the verdict in favor of defendants, and in entering the judgment. Inasmuch as the cause probably will be tried again we refrain from discussing plaintiff's evidence in detail. Suffice it to say that we are of the opinion that the evidence introduced by her sufficiently disclosed, prima facie, that both defendants, after their respective discharges in bankruptcy, distinctly and unequivocally promised to pay to plaintiff the balance of the indebtedness as evidenced by the unpaid notes sued upon. And plaintiff's evidence further disclosed that, after said promises had been made, one or the other of the defendants made payments to plaintiff on account, aggregating \$56.

The judgment of the municipal court, appealed from, is reversed and the cause remanded.

REVERSED AND REMANDED.

Kerner, P. J., and Scanlan, J., concur.

[illegible]

CONFIDENTIAL - SECURITY INFORMATION

SECRET

1994; *Journal of the American Academy of Child and Adolescent Psychiatry*, 33, 1031-1040.

colony was able to locate and resist the presence of the

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DATE: 11/11/2011 11:11 AM

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

The date is due in connection with the above mentioned

Objections, unless with a statement printed by the printer to pay

*Another is to allow a party, upon all

After reviewing the findings in the present case and

THE ABOVE INFORMATION IS BEING FURNISHED BY THE FBI AT THE REQUEST OF THE FBI

Report is being made to the Department of the Interior, Bureau of Reclamation, Washington, D.C., for their consideration.

and gathered in the neighborhood to watch and discuss the matter.

Information on the above products will be listed again in subsequent issues.

SECRET

REF ID: A68079

It is very clear that we are of the opinion that the various individuals mentioned herein will be of use to you as well.

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From this perspective, it is important to understand the

—of 1973 to control all activities of you as business officials.

10-11-68

and planning also require a high degree of flexibility and adaptability.

51. attorneys, their associates and 35 entities will be very quiet and

1967-1968

«Восстановит елика нѣкогда была»

RECEIVED : 16 JAN 1960

35913

WALLACE B. BEHNKE,
Appellee,

v.

WALTER E. GUSTAVSON
and HANNA C. GUSTAVSON,
Appellants.

14/7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 622³

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

On October 30, 1931, there was a judgment by confession entered against defendants for \$1119.40, on their note, dated September 5, 1930, payable to the order of plaintiff in stated monthly installments for 15 successive months - the last installment being for \$247.50, due on December 5, 1931. The note only provided for interest after maturity at the rate of 7 per cent per annum. In the usual place the amount of the note is stated in figures to be "\$1897.50," but upon its face it is stated in words: "At the dates hereinafter mentioned, for value received, we jointly and severally promise to pay to the order of Wallace B. Behnke * * the sum of sixteen hundred fifty and no/100 Dollars in the following installments, and agree that on default in the payment of any installment the whole amount of this note shall then and there become due at the election of the legal holder hereof." Then follows a tabulation of the installments, giving the amount and due date of each. The aggregate of all installments is \$1897.50, and the aggregate of all except the last is \$1650. The confession of judgment clause is as follows: "In consideration whereof, and to secure the payment of said amount * * we hereby authorize, irrevocably, any attorney of any court of record, to appear in such court, in term time or

1931

WILLIAM D. BOWEN,
Appellant.

WILLIAM D. BOWEN,
Appellant.
vs.
JAMES E. GUSTAFSON,
Appellee.

THE JUDICIAL DISTRICT COURT OF THE DISTRICT OF COLUMBIA.

ON October 20, 1931, there was a judgment by the court.

entered against defendant for \$1112.40, on which were added

interest at 6% per annum to the order of plaintiff in dated

monthly installments for 12 consecutive months - the first installment

being for \$94.80 due on December 8, 1931. The note only provided

for interest after maturity at the rate of 7 per cent per annum. In

the usual place the amount of the note is stated in full to be

"\$1112.40," but upon its face it is stated in words "the value

hereinafter mentioned, for value received, we jointly and severally

promise to pay to the order of William D. Bowen - the sum of

eleven hundred fifty and no/100 dollars in the following install-

ments, and agree that we shall in the payment of any installment

the whole amount of this note shall then and there become due as

the direction of the legal holder thereof." Then follows a recitation

of the installment, giving the amount and the date of each. The

sum of all installments is \$1112.40, and the aggregate of all

interest thereon is \$112.40. The conclusion of judgment shows in no

follows: "In consideration thereof, and to secure the payment of

said amount - we hereby authorize, irrevocably, and assign to

my court of record, so appear in such court, in and from us

2681A. 622

COURT OF DISTRICT

WILLIAM D. BOWEN

vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note for such amount as may appear to be unpaid thereon, together with costs and an attorney's fee of 10 per cent of such amount, but not less than \$10; * *." On November 13, 1931, on defendant's motion supported by the affidavit of Walter E. Gustavson, the court ordered that the confessed judgment be opened (the same to stand as security), that the affidavit stand as defendants' affidavit of merits and that they be given leave to make their defense, etc. On January 8, 1932, there was a trial without a jury, at which plaintiff and Gustavson testified, and the note and a certain letter were introduced. The court's finding was that \$981.25 was due from defendants at the date of the judgment as confessed. And the court adjudged that that judgment be reduced "to the sum of \$981.25, for which amount it is confirmed and ordered to stand in full force and effect * * as of the date of rendition thereof," etc. From the judgment defendants have appealed.

In Gustavson's affidavit he alleged that defendants executed the note "in the sum of \$1897.50;" that upon it defendants "have paid on account the sum of \$1,000;" that when the note was executed they received from plaintiff the sum of \$1650; that plaintiff attempted to collect in advance, "as interest and commissions," a sum greater than 7% per annum; that the judgment as confessed "included interest at the rate of 7% per annum from April 13, 1931, together with \$131.30 for attorney's fees, whereas the power of attorney contained in the note provides for attorney's fees in the sum of 10 per cent;" and that the statement of claim and cognovit alleges that defendants were indebted upon a note in the sum of \$1897.50, while it appears from the copy of the note attached thereto that said indebtedness was for the sum of \$1650 only."

vacation, at any time hereafter, and receive a judgment without

process in favor of the holder of this note for such amount as

may appear to be unpaid thereon, together with costs and an attorney's

fee of 10 per cent of such amount, but not less than \$5.00, on

payment in 1932, on defendant's written request to the plaintiff

of Walter B. Gresham, the court ordered that the defendant judgment

be opened (the same be stand as a security), that the plaintiff stand

as defendant, plaintiff at costs and that they be given leave to

make their defense, etc. On January 3, 1932, there was a trial with

one a jury, at which plaintiff and defendant testified, and the note

and a certain letter were introduced. The court's finding was that

1931-32 was the true defendant at the date of the judgment on com-

mand. And the court adjudged that said judgment be reduced to

the sum of \$501.25, for which amount it is confirmed and ordered to

stand in full force and effect as of the date of rendition there-

of, etc. From the judgment defendant has appealed.

In defendant's affidavit in answer to plaintiff's petition

the note is the sum of \$1500.00, and that it is a promissory note

on account of the sum of \$1500.00, and that the note was executed by

defendant from plaintiff the sum of \$1500 and plaintiff accepted

it subject to release, "as interest and commission," a sum greater

than 10 per cent; that the judgment on defendant's petition is

at the sum of \$501.25, and that it is a promissory note

on account of the sum of \$1500.00, and that the note was executed by

defendant from plaintiff the sum of \$1500 and plaintiff accepted

it subject to release, "as interest and commission," a sum greater

than 10 per cent; that the judgment on defendant's petition is

at the sum of \$501.25, and that it is a promissory note

on account of the sum of \$1500.00, and that the note was executed by

On the trial plaintiff testified in substance that he was engaged in the oil burner business and had had numerous business transactions with Gustavson; that early in September, 1930, Gustavson urged him to make a loan to Gustavson for \$1650; that at first he refused but finally agreed to do so; that Gustavson said he would sign a judgment note as security and would have his mother, Hanna Gustavson, who owned certain real estate, also sign the note; that plaintiff said he would have to have the title to the real estate investigated and that the expense thereof, and of the drafting of all papers, should be borne by Gustavson, and that the same as well as interest in advance at 6% should be included in the note, to all of which Gustavson consented; that the investigation was made and an attorney employed to draft all papers and attend to the details; that the interest in advance and all expenses totalled \$247.50, which is the amount of the last installment of the note as drafted; that said expenses (itemized) are: Interest in advance at 6% per annum, \$111.03; title search, \$25; credit reports, \$5; attorney's fees, \$50; and "carrying charge," \$56.47; that after the note was drafted Gustavson signed it, obtained his mother's signature thereon, and delivered it to plaintiff and received plaintiff's check (introduced in evidence) for \$1650, dated September 5, 1930, and payable to the order of both defendants, which check subsequently was cashed; that defendants made payments in installments from time to time on the note, aggregating \$943.53, the last payment being made on June 18, 1931 (said installments are indorsed on the back of the note); that in August, 1931, plaintiff gave defendants a "refund" on the note for the "carrying charge" of \$56.47, making the total credit \$1,000; that thereafter defendants did not make any further payments, although they were frequently requested so to do; and that on October 30, 1931, plaintiff caused the judgment by confession

On the trial plaintiff testified in substance that he was engaged in the oil business and had numerous business transactions with Gustavson that being in evidence, the court found that he was a bona fide oil man; that at that time he was not finally agreed to do so; that Gustavson said he would give a judgment note as security and would have his mother, Hanna Gustavson, who owned certain real estate, also sign the note; that plaintiff said he would have to have the title to the real estate investigated and that the expenses thereof, and of the making of all papers, should be borne by Gustavson, and that the same be well as interest in advance as he should be included in the note, so all at which Gustavson consented; that the investigation was made and an attorney employed to draft all papers and attend to the details; that the interest in money and all expenses totaling \$12,500, plus in the amount of the first installment of two notes on ground; that said expenses (included) and interest in advance of 60 per annum, \$12,500 plus interest, that being the amount of the first installment of \$1000 and "country money", \$2500; that after the note was drafted Gustavson signed it; obtained his mother's signature thereon; and delivered it to plaintiff and received plaintiff's check (endorsement in evidence) for \$1250, dated September 2, 1920, and payable to the order of said plaintiff, which check immediately was cashed; that plaintiff made payments in installments from time to time on the note, aggregating \$2500.00, the last payment being made on June 10, 1921 (said installments and interest on the back of the note); that in August, 1921, plaintiff gave defendant a "release" on the note for the "country money", \$2500, making the total cash \$5000; that thereafter defendant did not make any further payments, although that was frequently requested so to do; and that on

to be entered. Plaintiff further testified that the amount of sixteen hundred and fifty dollars, typewritten in the body of the note, was an error and should have been eighteen hundred, ninety seven and 50/100 dollars, "as the amount of the 15 installments on the note * * total the sum of \$1897.50."

Gustavson testified on behalf of defendants in substance that when he applied to plaintiff for the loan he said that his mother, Hanna Gustavson, would "execute a note jointly with him;" that he told plaintiff that she "owned real estate and was financially responsible;" that when the note was drafted "nothing was said to him about the various charges made by Behnke;" that he (Gustavson) "understood that interest and a slight carrying charge were the only amounts to be paid by him;" and that he "was in a hurry to get the money." While on the stand he did not make any showing that the amount included in the note of \$111.03, for "interest in advance" was usurious, or that the other items included therein (viz, title search, \$25; credit reports, \$5; and attorney's fees, \$50) were improper, or that they had not been agreed to, or that plaintiff had not made disbursements for these expenses. He introduced in evidence a letter, dated August 24, 1931, which he had received from plaintiff. In it plaintiff wrote that no part of the installments due on June 5, July 5, and August 5, 1931, had been paid; that the amount of the note is \$1897.50; that the "amount paid" is \$1,000 (i.e., \$943.53 by cash and \$56.47 by refund) and the balance due is \$897.50; that because of the "three months in arrears" he "hereby declares the full amount of the note due and payable at once;" and that "if payment in full is not received on or before September 1, 1931," suit on the note will be commenced.

In urging a reversal of the judgment appealed from, defendants' counsel's main contention is that defendants'

to be entered. Plaintiff further testified that the amount of
eleven hundred and fifty dollars, represented in the body of the
note, was an error and should have been written hundred, sixty
seven and 80/100 dollars, "as the amount of the 15 installment
on the note is a total of \$117.50."
Cross-examination resulted in Plaintiff testifying in substance
that when he applied to Plaintiff for the loan he said that his
brother, James Houston, would "execute a note for me with him."
That he said Plaintiff told him "would not enter and was financially
responsible," that when the note was drafted "nothing was said
to him about the various charges made by Plaintiff," that he (Houston)
"understood that interest and a slight carrying charge were the
only amounts to be paid by him," and that he "was in a hurry to
get the money." "While on the stand he did not make any showing
that the amount included in the note of \$117.50, for "interest in
advance" was warranted, or that the other items included therein
(viz, title search, \$25; credit report, \$5; and attorney's fees,
\$20) were improper, or that they had not been agreed to, or that
Plaintiff had not made arrangements for these expenses. He intro-
duced in evidence a report, dated around the 15th, which he had re-
ceived from Plaintiff. In it Plaintiff wrote that no part of the
installment due on June 1, 1931, and August 1, 1931, had been
paid; that the amount of the note is \$1007.50; that the "amount
paid" is \$17.00 (1934-1935); and that the balance of the "three months in
advance" he "has not received the full amount of the note due and
payable at once;" and that "if payment is full he has received on
or before September 1, 1931," and on the note will be interest.

in giving a receipt of the amount of the installment.

liability on the note is not greater than \$650, for the reason that the amount of the note, as expressed in words on its face, is "sixteen hundred and fifty dollars," and it appears that there are proper credits of \$1,000 to be deducted from that amount. In support of the contention, counsel refers to the following portion of section 17 of the Illinois "Negotiable Instrument Law" (Oahill's Stat. 1931, Chap. 93, p. 1952):

"Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

(1) Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount. * *

When consideration is given to the entire provisions of the note, and particularly the total amount of the 16 installments to be paid, each appearing on the face of the note, and referred to therein in words as "the following installments," we cannot agree with counsel's contention. We do not think that the note, taken in its entirety, should be considered as ambiguous. Furthermore, we are of the opinion that defendants are not in any position to here raise the point, because in Gustavson's affidavit (which was made defendants' affidavit of merits) he states that defendants executed the note "in the sum of \$1897.50."

Counsel further contends that the interest "in advance," included in the last installment of the note, viz, \$111.03, is usurious, but no attempt was made by defendants on the trial, nor is there here, to show wherein any usurious interest was attempted to be exacted. The trial court, when making the finding, stated there is "no usury proven in this transaction." It is the well settled law of this State that it is not usurious to exact the payment of interest in advance (Brown v. Scottish-American Mortgage Co., 110 Ill. 235;) or to deduct it in advance out of the proceeds

of a loan. (National Life Ins. Co. v. Donovan, 238 id. 223.)

And we do not think it can be considered as usurious, in a note not bearing any interest before maturity, to include legal interest on the loan in the last installment of the note, as in this case.

And we are of the opinion that the reduction by the court of the judgment as confessed, down to \$921.25, is substantially correct. The note being admittedly made for \$1297.50, it appears that defendants' total payments were \$943.53 and that plaintiff voluntarily refunded or waived the so-called "carrying charge" of \$56.47, included in the amount of the note. The payments and refund total \$1,000. This leaves a balance due on the note of \$297.50. And by the provisions of the note, if a judgment by confession was entered thereon (as it was) not exceeding 10% of said amount might be added to the judgment as an attorney's fee. Adding 10% of \$297.50 to \$297.50, makes a sum slightly in excess of \$921.25, as awarded by the court.

Finding no error in this record, the judgment appealed from is affirmed.

AFFIRMED.

Kernex, P. J., and Scanlan, J., concur.

of a loan. (National Life Ins. Co. v. Liberty Nat. Bk., 1911.)

and we do not think it can be considered as a loan, in a note
and creating any interest before maturity, as in the legal interest
and the loan in the fact of the maturity of the note, as in this case.

and we are of the opinion that the reduction by the
value of the judgment as confessed, down to \$100,000, is substantially
correct. The note being substantially made for \$100,000, it appears

that substantially, legal payments were still due and that judgment
voluntarily rendered on behalf the so-called "paying charge" of
\$100,000, included in the amount of the note. The payments and

interest total \$1,000. This leaves a balance due on the note of
\$100,000. And if the provisions of the note, it is a judgment of the
court was entered thereon (as it was) not exceeding \$100,000.

amount might be added to the judgment as an attorney's fee. Adding
it to \$100,000 to \$100,000, making a sum slightly in excess of
\$100,000, as stated by the court.

Nothing we know is in the record, the judgment against
them is affirmed.

ATTORNEYS.

ATTORNEYS: J. L. and Joseph, L. J. J. J.

ATTORNEYS: J. L. and Joseph, L. J. J.

35927

MARY SHEA,
Appellee,

v.

NATIONAL TEA CO.,
a corporation,
Appellant.

142 A
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

267 I.A. 622⁴

MR. JUSTICE GRILEY DELIVERED THE OPINION OF THE COURT.

In an action to recover damages for personal injuries received by plaintiff in defendant's store about 9 o'clock in the morning of May 25, 1929, there was a trial before a jury in January, 1932, resulting in a verdict and judgment against defendant for \$650, and the present appeal followed.

Plaintiff's declaration consisted of two counts. In the first she averred in substance that defendant was engaged in the grocery business in Chicago; that one of its retail stores was located on the south side of Granville avenue, between Broadway and Winthrop avenue, where it sold groceries and other foods and merchandise to the general public, and where plaintiff and others were invited to come and make purchases; that on the morning mentioned she, a housekeeper, went to the store to purchase certain groceries and meats; that while making her purchases and while in the exercise of due care for her own safety, defendant, by its servants, "negligently permitted certain grease, oil and slippery material to remain on the floor" of said store, which was dangerous to plaintiff and others walking on the floor, all of which defendant knew or should have known and of which plaintiff did not have equal knowledge; and that because of said negligence, when plaintiff was walking on the floor, she was caused to slip and fall, whereby she

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2000 I.A. 622

MR. JUSTICE BRADLEY DELIVERED THE OPINION OF THE COURT.

In an action to recover damages for personal injuries
 received by plaintiff in defendant's store, which is
 the building of No. 12, 12th St., there was a trial before a jury in
 January, 1901, resulting in a verdict and judgment against
 defendant for \$2000, and the present appeal follows.

Plaintiff's petition consisted of two counts. In

the first she averred in substance that defendant was engaged
 in the grocery business in Chicago; that one of its retail stores
 was located on the south side of Grandville Avenue, between Broadway
 and Winthrop Avenue, where it sold groceries and other food and
 merchandise to the general public, and where plaintiff and others
 were invited to come and make purchases; that on the morning men-
 tioned above, a housekeeper, went to the store to purchase certain
 groceries and meats; that while making her purchases and while in
 the vicinity of the said lot was struck, & thrown, by the
 defendant, "negligently" by means of certain goods, all and alleging
 material to remain in the store, of said store, which was dangerous
 to plaintiff and others walking on the street, all of which defendants
 knew at said time knew and of which plaintiff did not have equal
 knowledge; and that because of said negligence, when plaintiff was

received serious injuries to divers parts of her body, which caused pain and anguish, and whereby she was prevented from attending to her ordinary affairs and household duties, and was compelled to expend or become liable for large sums of money for doctor's bills, medicines, etc. In the second count the charge is that defendant by its servants "negligently permitted grease, oil, banana skins, pears, peaches, prunes, water or other slippery material to accumulated on said floor, without warning to plaintiff and other persons * * and without placing a barricade or other protection around said slippery material on said floor." Defendant filed a plea of the general issue.

On the trial plaintiff was her only occurrence witness, and she was examined and cross-examined at length. She also testified as to the extent and nature of her injuries, as did her attending physician, Dr. Larkin, and her daughter, Elizabeth Shea, who lived with her at their home at 6040 Kenmore avenue. It is not here claimed that the verdict is excessive.

The main contention of defendant's counsel is that the verdict is against the manifest weight of the evidence on the question of defendant's liability to plaintiff. On the trial defendant called four witnesses in its behalf, all employees of it, - Joseph M. Schneider, store manager; Earl Ford, its colored porter, who had mopped or was mopping the floor at the time plaintiff slipped, fell and received her injuries; and Phyllis Buchler and Robert Huff, who were working in the store at the time and witnessed the accident. Their testimony is contradictory to that of plaintiff's in some essential particulars. But, after reviewing plaintiff's testimony, as contained in the abstract, and also that of all four of defendant's witnesses, we are unable to say that the verdict is manifestly against the weight of

the evidence. No useful purpose will be served in outlining the testimony of the several witnesses. Suffice it to say that we are of the opinion that the entire evidence sufficiently discloses that defendant was guilty of the negligence charged, rendering it liable to respond in damages to plaintiff, an invitee upon its premises, in the amount as fixed by the jury. (Fauckner v. Waken, 231 Ill. 276, 279; Furtell v. Philadelphia Coal Co., 256 Id. 110, 114; McNeil v. William G. Brown & Co., 22 Fed., 2nd, 675; Isaac Benesch & Sons v. Ferkler, 153 Md. 680, 683.)

Defendants counsel also contend that the court committed reversible error in refusing to give certain instructions offered by defendant.. The contention is without merit. Among the given instructions were fifteen, offered by defendant. We think that the matters embodied in the refused instructions were sufficiently covered by those given and that the jury were fully and fairly instructed. (See Amossen v. Swift & Co., 243 Ill. 93, 98.)

Equally without merit, in our opinion, is counsels' further contention that the court erred in refusing to strike out, on counsels' motion, certain of plaintiff's testimony to the effect that she had been compelled to employ a maid, at \$12 a week, to perform her household duties during the time she was incapacitated because of the injuries received.

The judgment of the superior court should be affirmed and it is so ordered.

AFFIRMED.

Kerner, P. J., and Scanlan, J., concur.

35936

FRIDOLIN PABST,
Appellee,

vs.

R. M. EDDY FOUNDRY CO.,
Appellant.

143
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 623

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of the 1st class in assumpsit, commenced on April 11, 1931, by the endorsee and holder of a promissory note against the purported maker, there was a trial before a jury in December 1931. At the conclusion of defendant's evidence the court on plaintiff's motion directed the jury to find the issues against defendant and to assess plaintiff's damages at the sum of \$4599.50, and such verdict was returned. On January 9, 1932, the court entered judgment against defendant in said sum and the present appeal followed.

In plaintiff's statement of claim he alleged in substance that his claim is for money due upon a note signed "R. M. Eddy Foundry Co., by C. M. Eddy, president," dated "Chicago, October 20, 1930," and wherein, for value received, the maker promised to pay to the order of "J. E. & L. C. Berry," four months after date, the sum of \$4300, with interest at the rate of 6 per cent. per annum; that the note "was duly endorsed and delivered by the payees to the plaintiff," who "is the bona fide holder thereof for value before maturity"; and that there is now due to the plaintiff the said sum of \$4300, together with interest thereon at the rate of 6 per cent. per annum from October 20, 1930, etc.

In defendant's affidavit of merits, sworn to on April 22, 1931, by W. T. Denner, secretary and treasurer of defendant, it is alleged that the note "was within the last thirty days in the possession of one Berry, who then and there declared himself as the

1204

BRIDGES, T. J.

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W. R. RICE COMPANY
Manufacturers

ESD A. I 502

THESE RESULTS WERE OBTAINED FROM A SINGLE TRIAL. REPEATED TRIALS WERE CONDUCTED TO OBTAIN A MORE ACCURATE MEASUREMENT OF THE EFFECTS OF THE TREATMENT.

IN an action of the last class is appealed, commenced on April 11, 1931, by the defendant and holder of a promissory note against the purported maker, there was a trial before a jury in November 1931. At the conclusion of testimony the jury on plaintiff's action directed the jury to find the issue against defendant and to assess plaintiff's damages at the sum of \$4,000.00, and such verdict was returned. On January 9, 1932, the court entered judgment against defendant in said sum and the present appeal.

1931, by W. T. Danner, secretary and treasurer of defendant, it is alleged that the note "was within the last thirty days in the possession of defendant, and that it was not until the said note was produced to the plaintiff, who is the legal owner of the same, that the plaintiff was made aware of its existence. The plaintiff is now due on the note the sum of \$4300, together with interest thereon at the rate of 6 per cent. per annum from October 25, 1930, etc.

legal owner and holder thereof, when exhibiting same to this affiant"; that at such time the note was past due, and that, therefore, plaintiff "is not the bona fide holder thereof for value before maturity"; that the books and records of defendant do not contain any entry or other evidence tending to show anything with reference to the alleged note sued upon; that from a careful examination of said books and records this affiant has been unable to discover any clue or trace of any credit, forbearance or consideration given to defendant by J. M. & L. C. Berry, or either of them, payees in the note; that defendant never received anything of value for the alleged execution by it of said note"; that "the execution, delivery and transfer, out of which said note arose, was procured through the fraud, connivance and circumvention of said J. M. & L. C. Berry, or either of them, dealing fraudulently and wrongfully with said Charles M. Eddy, in his individual capacity, and not with him as president of defendant"; that "said transaction was fraudulently and knowingly perpetrated and consummated between said J. M. & L. C. Berry, or either of them, and said Charles M. Eddy, individually, to the end that funds were furnished to said Eddy for his individual use"; that defendant corporation did not receive any consideration, good, valuable or otherwise, for said note; and that said Eddy is now deceased and was deceased before the commencement of the present action.

It will be noticed that in said affidavit of merits there is no denial in exoneres terms of the execution of the note by defendant.

At the beginning of the trial plaintiff's attorney produced the original note and offered it in evidence. Defendant's attorney objected to its introduction without plaintiff first proving its execution. Upon plaintiff's attorney contending that its execution had not sufficiently been denied by verified plea or affidavit, as provided in section 52 of the Practice Act, and upon defendant's

legal owner and holder thereof, when exhibiting same to this atty-
and; that at such time the note was past due, and that, therefore,
plaintiff is not the bona fide holder thereof for value before ma-
turity; that the books and records of defendant do not contain any
entry or other statement tending to show anything with reference to
the alleged note used upon; that from a careful examination of said
books and records this atty has been unable to discover any clue
or trace of any credit, endorsement or consideration given to de-
fendant by J. A. & C. Berry, or either of them, before in the
case; that defendant never received anything in value for the
alleged execution by it of said note; that the execution, delivery
and transfer, out of which said note arose, was procured through the
trust, confidence and intervention of said J. A. & C. Berry, or
either of them, dealing fraudulently and wrongfully with plaintiff
J. Berry, in his individual capacity, and not with him as president
of defendant; that said transaction was fraudulently and knowingly
perpetrated and consummated between said J. A. & C. Berry, or
either of them, and said Charles E. Berry, individually, to the end
that funds were furnished to said Berry for his individual use;
that defendant corporation did not receive any consideration, good,
valuable or otherwise, for said note; and that said Berry is now de-
ceased and has deceased before the commencement of the present action.
It will be noticed that in said affidavit of notice there
is no denial in certain form of the execution of the note by de-
fendant.
At the beginning of the trial plaintiff's attorney proposed
the original note and offered it in evidence. Defendant's attorney
objected to its introduction without plaintiff first proving its
execution. Upon plaintiff's attorney contending that its execution
had not sufficiently been denied by verified plea or affidavit, as

attorney contending to the contrary, the court, after examining the note and defendant's affidavit of merits, admitted the note in evidence over defendant's objection. A photostatic copy of the note is contained in the present transcript. Its terms are the same as stated in plaintiff's statement of claim. It is dated "Chicago Oct. 20th, 1930"; the amount is "~~\$~~4300"; the maturity is "four months after date" (i. e., February 20, 1931); the payees are "J. M. & L. C. Berry"; and the signature is partially in type by a hand stamp and partially in handwriting. "R. S. Eddy Foundry Co." is in stamped type and "C. M. Eddy" is in handwriting; the handwriting partially extends over or under (it is difficult to tell which) the stamped type; and very faintly underneath or over a small portion of the handwriting may be discerned the word "president", also in stamped type. On the back of the note there are two endorsements in blank, viz., "J. M. & L. C. Berry" and "John M. Berry."

Thereupon plaintiff called as a witness Ira L. Hicks, who on direct examination testified that he was "familiar with the transactions concerning the note sued upon"; that he had computed the interest at the rate of 6 per cent. per annum from October 20, 1930, on \$4300; that the face of the note plus said interest amounted to the total sum of \$4,599.50; and that no part of the principal or interest had been paid. On cross examination he testified in substance that he was a representative of the plaintiff, Pabst,—the present holder of the note; that he was not present when the endorsement "J. M. and L. C. Berry" was made on the back of the note and does not know when it was so endorsed; that he first saw the note "the latter part of October, 1930," in the office of the Pabst Company, when he and John M. Berry were present but not plaintiff; that the note was delivered by John M. Berry to plaintiff, or rather "to me for Mr. Pabst" (plaintiff), "the latter part of October, 1930"; that he (the witness) then put the note "in the

attorney contending to the contrary. The court, after examining the
note and defendant's affidavit of liability, ordered the note to be
taken over defendant's objection. A photostatic copy of the note
is contained in the present transcript. The terms and the sum as
stated in plaintiff's statement of claim. It is dated "Chicago
Nov. 20th, 1930"; the number is "4300"; the maturity is "two months
after date" (i. e., February 20, 1931); the interest is "3 per cent.
per annum"; and the signature is partially in type by a hand stamp and
partially in handwriting. "W. E. Berry" is in stamp
type and "W. E. Berry" is in handwriting; the handwriting partially
extends over or under (it is difficult to tell which) the stamped
type; and very faintly underneath or over a small portion of the
handwriting may be discerned the words "plaintiff", also in stamp
type. On the back of the note there are two endorsements in stamp
type, "W. E. Berry" and "John E. Berry".

Thereupon plaintiff called as a witness Mr. E. Allen, who on
direct examination testified that he was "familiar with the transac-
tions concerning the note and loan"; that he had computed the in-
terest at the rate of 3 per cent. per annum from October 20, 1930,
on \$4300; that the face of the note plus said interest amounted to
the total sum of \$4,769.50; and that no part of the principal or
interest had been paid. On cross examination he testified in un-
derstanding that he was a representative of the plaintiff, Robert, the
present owner of the note, that he was not present when the en-
dorsement "W. E. Berry" was made on the back of the note
and does not know when it was so endorsed; that he knew saw the
note "the latter part of October, 1930," in the office of the Robert
Berry, who is now Mrs. E. Berry with present and past residence;
that the note was delivered by John E. Berry to plaintiff, or
rather "to me Mr. Robert" (plaintiff), "the latter part of

vault of the Pabst Company" and "left it there" until the "spring of 1931", when "Mr. Berry came and got the note from me"; that the note "was given to us" in consideration of the delivery to John M. Berry of a deed to certain property owned by Mr. Pabst (plaintiff) ^{which} on/said Berry held a second mortgage; that the note "was given to us in consideration of our delivering the deed and not permitting the property to go through foreclosure proceedings by the holder of the first mortgage"; and that said deed was delivered "in October, 1930". The witness was asked to give the date of the deed and when delivered, but the court sustained plaintiff's objection to the question, saying to defendant's attorney: "You are wasting time; put in your defense."

Thereupon defendant called Leo E. Walsh, auditor for the Goss Printing Press Mfg. Co., and he testified in substance that he first met John M. Berry at the office of defendant's attorneys in Chicago, "some time in March, 1931," (i. e., after the maturity of the note sued upon); that Berry had possession of the note and four other similar notes; that there was a conversation about the payment of the notes "as a group"; that Berry said he "wanted to get paid for the notes," and that he "would take a discount", and that he "was the owner of the notes"; that the witness asked Berry what was the consideration for the notes, and particularly for the one sued upon, and that Berry replied that he "wouldn't have to show me until he was compelled to in a court of law." The witness was then asked if Berry said anything with reference to his dealings with C. M. Eddy "personally", but the court, on objection made by plaintiff, would not allow him to answer.

W. T. Demmer, defendant's witness, testified that in March, 1931, he was secretary and treasurer and a director of defendant; that he became associated with defendant as such in December, 1930, "after C. M. Eddy's death"; that he was present at an interview had with John M. Berry at the office of defendant's attorneys "in

of the Federal Company" and "left to them" until the "spring of 1931", when "Mr. Berry came and got the note from me"; that the note "was given to me" in consideration of the delivery to John M. Berry of a deed to certain property owned by Dr. Robert (plaintiff) ^{which} said Berry held a second mortgage; that the note "was given to me in consideration of our delivering the deed and not permitting the property to go through foreclosure proceedings by the holder of the first mortgage"; and that said deed was delivered "in October, 1930". The witness was asked to give the date of the deed and when delivered, but the court sustained plaintiff's objection to the question, saying to defendant's attorney: "You are wasting time; put in your defense."

The witness defendant called was E. E. Berry, brother of the late E. E. Berry, deceased. He testified in substance that he first met John M. Berry at the office of defendant's attorney in Chicago, "some time in March, 1931" (i. e., after the maturity of the note sued upon); that Berry had possession of the note and four other similar notes; that there was a conversation about the payment of the notes "as a group"; that Berry said he "wanted to get paid for the notes," and that he "would take a discount," and that he "was the owner of the notes"; that the witness asked Berry what was the consideration for the notes, and particularly for the one sued upon, and that Berry replied that he "wouldn't have to show me until he was compelled to in a court of law." The witness was then asked if Berry held anything with reference to his dealings with C. E. Berry "personally", but the court, on objection made by plaintiff, would not allow him to answer.

E. E. Berry, defendant's witness, testified that in March, 1931, he was secretary and treasurer and a director of defendant; that he became associated with defendant on such in December, 1930.

the spring of 1931, about the latter part of March, 1931"; that Walsh and others were present; that Berry had possession of five notes "as a group" and there produced them, including the note sued upon, and demanded payment or a "settlement" of them; that Berry then "was asked if he (Berry) owned the notes and he said yes"; that the witness then examined the note sued upon; and that at that time "there were no signatures on the back of it." Subsequently, the witness was asked if, at said interview or conversation, "Berry said anything further with reference to the notes signed by C. M. Eddy." Upon objection made, the court would not allow the witness to answer, unless the witness could say that Berry's statements were made with reference to "the particular note sued upon." Thereupon the witness testified that "there was conversation as to that instrument in connection with some other notes as a group." Thereupon the court ruled that, as it appeared that Berry's further statements were not made as regards the particular note sued upon but only as regards certain notes "as a group", the witness could not state what Berry further said at the interview. The witness then was asked if at that interview Berry had said anything as regards his "making loans to Mr. Eddy personally," but was not allowed to answer for the same reasons. And it appeared upon the trial that defendant had endeavored, by subpoena and otherwise, to procure the attendance of said Berry as a witness but that he could not be found.

Joseph Eifel, defendant's witness, testified that he is vice-president and treasurer of the Flash Sales Corporation; that he knew C. M. Eddy in his lifetime and knows John M. Berry; that the latter called at his office repeatedly in October and November, 1930; that in October, 1930, he had a conversation with Berry relative to certain notes signed or endorsed by Eddy; that there were several of these notes including the note sued upon; and that the conversation did not relate to the particular note but to a number of notes as a

the system of Bill, about the latter part of 1930; that
Welsh and others were present; that Henry had possession of five
notes "as a group" and others produced them, including the note now
before me, and identified it as a "reproduction" of 1930; that Henry
then "asked if he (Henry) owned the notes and he said yes";
that the witness then examined the notes each upon; and that at
that time "there were no signatures on the back of it." Subse-
quently, the witness was asked if, at said interview or conversation,
"Henry said anything further with reference to the notes signed by
E. M. Kelly." Upon objection made, the court would not allow the
witness to answer, unless the witness could say that Henry's state-
ments were made with reference to "the particular note now upon."
Thereupon the witness testified that "there was conversation as to
that statement in connection with the notes as a group."
Thereupon the court ruled that, as it appeared that Henry's last
statements were not made as regards the particular note now upon
but only as regards certain notes "as a group", the witness would
not state what Henry further said at the interview. The witness
then was asked if at that interview Henry had said anything as re-
gards his "working loans to ex. Kelly personally," and was not allowed
to answer for the same reason. And it appeared upon the trial that
defendant had understood, by defendant and counsel, to procure the
attendance of said Henry as a witness but that he would not be found.
Joseph E. Kelly, defendant's witness, testified that he is a
president and treasurer of the Irish Gaelic Corporation; that he knew
D. M. Kelly in his lifetime and knows John M. Kelly; that the latter
called at his office Wednesday in October and November, 1930; that
in October, 1930, he had a conversation with Henry relative to cer-
tain notes signed as witnessed by Kelly; that there were several of
these notes including the note now upon; and that the conversation

group. Upon being asked what the conversation was, the court, upon objection, would not allow him to testify thereto, unless it related solely to the particular note in suit, which the witness said it did not. Defendant's attorney, out of the presence of the jury, then made the following offer: "The witness will testify that in October, 1930, Berry said that Eddy had repudiated certain notes which he had endorsed and wouldn't pay them because the interest was usurious; that Berry further said that he had loaned money to Eddy personally and had done things to the corporations for which he (Berry) could put him in jail, that he had made loans to Eddy, ** and that if Eddy didn't pay he would disclose the transaction." Thereupon the court said that it would allow testimony of the conversation provided it related solely to the particular note in suit, and not to a series or group of notes. Defendant's attorney contended that the admission of the conversation was proper for the jury's consideration, because it related to the note in suit together with others of a group. After further argument the court finally ruled against the admission of the testimony of the conversation before the jury.

Elizabeth M. Carlyle, defendant's witness, testified that in October, 1930, and prior thereto she was the bookkeeper of defendant and made all entries in its books in her handwriting, except in the summer of 1930, when she was away on a vacation, when one Carpenter made the entries (books produced); that on October 20, 1930, or immediately prior thereto, there is no entry or any memorandum showing that defendant corporation received a sum of money in the amount of \$4300 from anyone; that defendant did not receive any checks from J. M. or L. C. Berry on said day or prior thereto; and that if said money or checks had been received by defendant there would have been entries in the defendant's books showing the same.

group. Upon being asked what the conversation was, the court, upon objection, would not allow him to testify thereto, unless it related solely to the particular note in suit, which the witness said it did not. Defendant's attorney, out of the testimony of the jury, then made the following offer: "The witness will testify that in October, 1930, Betty said that Jack had repudiated certain notes which he had endorsed and wouldn't pay them because the interest was overdue; that Betty further said that he had formed money to Betty personally and had done things to the corporation for which he (Betty) could put him in jail, that he had made loans to Betty, and that if Betty didn't pay he would likewise sue the corporation." Thereupon the court said that it would allow testimony of the corporation provided it related solely to the particular note in suit, and not to a series of group of notes. Defendant's attorney contended that the admission of the conversation was proper for the jury's consideration, because it related to the note in suit together with others of a group. After further argument the court finally ruled against the admission of the testimony of the conversation before the jury.

Elizabeth M. Garfield, defendant's witness, testified that in October, 1930, and prior thereto she was the bookkeeper of defendant and made all entries in his books in her handwriting, except in the summer of 1930, when she was away on a vacation, when one Garpenter made the entries (books produced); that on October 20, 1930, or immediately prior thereto, there is no entry or any money transfer showing that defendant corporation received a sum of money in the amount of \$4500 from anyone; that defendant did not receive any checks from J. M. or L. C. Betty on said day or prior thereto; and that if said money or checks had been received by defendant

After carefully considering the pleadings, the court's rulings as above as to certain evidence offered by defendant, and the arguments of respective counsel, we are of the opinion that the court unduly and improperly restricted defendant in the presentation of evidence tending to sustain its defenses to the note in question, and also erred, after making said rulings, in instructing the jury to find the issues for plaintiff and in entering the judgment appealed from. Defendant's defenses, as outlined in its affidavit of merits were in substance (1) that plaintiff was not a bona fide holder of the note, for value before maturity, and hence it was subject to the same defenses as if in the hands of the original payees; (2) that defendant never received anything of value as a consideration for the note; and (3) that the note was fraudulently issued in the name of defendant for the purpose of paying an individual debt of C. E. Eddy to the Berrys or one of them, in which fraud the Berrys or one of them knowingly participated. As to the 1st defense, it is apparent from the testimony of the witnesses Walsh and Danner that there was evidence tending to prove the defense. And, as Hicks' testimony is somewhat to the contrary, it was for the jury and not the court to decide whether plaintiff was a bona fide holder of the note before or after maturity. As to defendant's defenses (2) and (3), we think that the excluded testimony of defendant's witnesses, Walsh, Danner and Eifel, taken in connection with that of defendant's witness, Carlyle, and other evidence, tended to prove said defenses and should have been submitted to the jury, together with such evidence to the contrary, if any, as plaintiff might have seen fit to introduce in rebuttal. There should be another trial of this cause.

Accordingly, the judgment of the municipal court of January 9, 1932, appealed from, is reversed and the cause is remanded.

REVERSED AND REMANDED.

Kerner, P. J., and Scanlan, J., concur.

After carefully considering the evidence, the court's
findings are based on the evidence offered by defendant, and
the arguments of respective counsel, we are of the opinion that
the court should and properly restricted defendant in the presen-
tation of evidence tending to establish its defense to the note in
question, and also ruled, after making said rulings, in instructing
the jury to find the issues for plaintiff and in entering the judg-
ment against defendant. Defendant's defense, as outlined in its affi-
davit of merits were in substance (1) that plaintiff was not a bona
fide holder of the note, for value for value, and hence it was
subject to the same defenses as it in the hands of the original
payee; (2) that defendant never received anything of value as a
consideration for the note; and (3) that the note was fraudulently
issued in the name of defendant for the purpose of paying an indi-
vidual debt of G. M. Eddy to the B-type or one of them, in which
brand the B-type or one of them knowingly participated. As to the
last defense, it is apparent from the testimony of the witnesses
Wain and Bennett that there was evidence tending to prove the de-
fense. And, as there is testimony in support of the contrary, it
was for the jury and not the court to decide whether plaintiff was
a bona fide holder of the note before or after maturity. As to
defendant's defense (2) and (3), we think that the excluded testi-
mony of defendant's witnesses, Wain, Bennett and Eddy, which is
connection with that of defendant's witnesses, Eddy, and other evi-
dence, tended to prove said defenses and should have been submitted
to the jury, together with such evidence to the contrary, if any, as
plaintiff might have seen fit to introduce in rebuttal. There should
be another trial of this case.

Accordingly, the judgment of the municipal court of January
9, 1932, appealed from, is reversed and the case is remanded.

REVEREND AND HONORABLE
Kern, P. J., and Graham, J., concur.

35945

RIVER FOREST COUNTRY CLUB,
a corporation,

Appellant,

vs.

FRANK G. HINEAN,

Appellee.

144
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 643²

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of the 4th class in contract, commenced by plaintiff (an Illinois corporation not for pecuniary profit) on May 22, 1931, to recover moneys claimed to be owing from defendant upon an open account and also upon his note, there was a trial without a jury on January 22, 1932, resulting in the court finding the issues against plaintiff and entering judgment against it for costs. The present appeal followed.

In plaintiff's statement of claim there is a tabulation of a total claimed indebtedness of \$713.44, as follows:

| | | |
|----------|-----------------------------------|--------|
| "1-15-30 | Dues & tax - 1st Half of 1930 | \$55. |
| 3-1-30 | Locker-1930 | 12.80 |
| 6-30-30 | Dues & Tax - 2nd Half of 1930 | 55.00 |
| 7-31-30 | Special Assessment & tax | 165. |
| | Balance on \$675 note | 375. |
| | Interest to 5-15-31 on above note | 50.94" |

In defendant's affidavit of merits he denied being indebted to plaintiff in any sum. Thereafter he filed a statement of claim of set-off, claiming damages in the sum of \$500. He therein alleged that he was induced to sign the note "by warranties of the directors that there would never be any assessments of any kind on the membership of plaintiff"; that relying upon the representations he paid certain installments on the note and in addition paid his annual dues for the privilege of playing golf and the usual locker fees, etc.; that in violation of its promise plaintiff levied a large assessment on the membership and threatened to continue the practice; that "because of such violation of the contract" the note

[illegible]

1992

ESD A.I. 732

THESE ARE THE ONLY TWO COPIES OF THE DOCUMENTS BEING RETURNED TO THE U.S. DEPARTMENT OF JUSTICE.

In Plaintiff's statement of claim there is a recitation of the facts of the case, to-wit: That on or about May 22, 1931, Plaintiff, by her attorney, caused to be filed in the County of Los Angeles, California, a certain "Complaint" against Defendant, to recover money claimed to be owing from Defendant upon an open account and also upon his note. There was a trial and judgment rendered in favor of Plaintiff on January 21, 1932, resulting in the entry of a judgment against Defendant for the sum of \$10,000.00, with interest thereon from the date of the trial to the date of payment.

[illegible]

in defendant's affidavit of denial he stated being asked to
be plaintiff in any case. Defendant he filed a statement of claim
of self, stating damages in the sum of \$1000. He therein alleged
that he was induced to enter the case by warranties of the defendant
and that there would never be any assessment of any kind on the respon-
sible of plaintiff; that he was the representative of said
certain individuals on the case, and in addition paid the costs
there for the services of plaintiff and the usual losses, etc.; that in violation of the promise plaintiff leveled a charge

"became void"; and that plaintiff became indebted to defendant in an amount equal to the payments already made on the note, with interest from date of payment, etc.

On the trial plaintiff called its secretary (A. C. d'Autrement) and its bookkeeper as witnesses, and, after proper identification had been made, introduced in evidence without objection various writings. Plaintiff's Exhibit 1 is defendant's written application for membership, dated June 26, 1928, as follows:

"I, the undersigned, do hereby make application for membership in the River Forest County Club and attach hereto my check for \$110 in payment of initiation fee therefor if elected to membership; and upon receipt of notice of my election to membership, I agree to execute and deliver to the Club an installment promissory note in the sum of \$675, in accordance with the form prescribed by the Club; it being understood that in case this application is rejected the payment made herewith shall be returned to me."

Plaintiff's Exhibit 2 is a copy of the usual certificate of membership issued to members. It was stipulated that such a certificate was issued to defendant in his name and accepted by him shortly after his admission as a member. The copy of the certificate is as follows:

"This is to certify that Mr. - - - - - has been duly elected and enrolled as a regular member of the RIVER FOREST COUNTY CLUB, and is entitled to all the privileges of the club, and to a pro rata interest in the property and assets of the club, subject to the By-Laws of said club, now in force or hereafter adopted, and such By-Laws are deemed to be an essential part of the contract of membership between the club and the member to whom this certificate is issued, and is so evidenced by the acceptance of this certificate, and also subject to all obligations of the member to the club.

This certificate can be sold or transferred only by and with the consent of the Board of Directors, in the manner prescribed by the By-Laws of the club, and only to a candidate for membership who after having made application in the usual manner has received the favorable vote of the directors. If so sold and transferred the assignee will acquire the rights and privileges of a member only upon the issuance of a new certificate in his name, to which he will be entitled upon surrendering this certificate to the club for cancellation, paying the transfer fee prescribed by the By-Laws, assuming the dues and assessments of the member selling, and paying all other obligations of the seller to the club outstanding at the date of the transfer."

Plaintiff's Exhibit 3 is the original ledger sheet of the account of defendant with plaintiff, taken from plaintiff's books. It shows a balance of \$135.76 due from defendant on his open account

on July 31, 1930. This balance is made up of the first three items (aggregating \$122.80), as above set forth in plaintiff's statement of claim, plus certain interest charges. The ledger sheet also shows a balance due from defendant on his "Improvement Note" account; he is debited, under date of June 26, 1928, with the amount of his note for \$675; there are six credits of \$50 each as payments made on the note, - the last payment being on January 23, 1930; and the account discloses a balance due to plaintiff on the note under date of July 31, 1930, of \$375. The ledger sheet also shows the charge of a special assessment (including tax) of \$165, on which assessment there are no items of credit, and, under date of July 31, 1930, it appears that said sum of \$165 is still due from defendant.

Plaintiff's exhibit 4 is the original note signed by defendant as follows:

"RIVER FOREST COUNTRY CLUB
Building and Improvement Note
River Forest, Ill., June 26, 1928

\$675

On or before 39 months from date, for value received, I promise to pay to the order of River Forest Country Club the sum of six hundred seventy five Dollars, payable in quarterly installments, with interest on all amounts unpaid at six per cent (6%) per annum, as follows:

The principal sum is payable in quarterly installments of fifty dollars (\$50) or more, each with interest at six per cent (6%) per annum, from date hereof, on the whole amount of the principal sum remaining unpaid from time to time, the first installment to become due and payable three months after date hereof, and the following installments to become due and payable at intervals of three months thereafter until the full amount of the principal sum shall have been paid; * *.

Default for ten days in the payment of any installment maturing hereunder shall, without notice, at the election of the legal holder hereof, effect maturity of the entire amount of installments specified in this note. This note is negotiable."

On the back of the note are endorsements showing six payments of \$50 each made from time to time on the principal sum and also for accrued interest, - the first payment being made on September 26, 1928, and the last on January 23, 1930.

Plaintiff's exhibit 5 is a certified copy of the By-Laws of plaintiff in force on June 26, 1928, together with all amendments

On July 31, 1933, this balance is made up of the first three items (amounting \$188.30), an above set forth in Exhibit A's statement of assets, plus certain interest charges. The ledger sheet also shows a balance due from defendant on his "Government Note", and amount he is entitled, under said Note No. 1234, with the interest of his note for 1933; there are also credits of \$100.00 on account made on the note, - the last payment being on January 22, 1933; and the account shows a balance due to plaintiff on the same date as of July 31, 1933, of \$275. The ledger sheet also shows the amount of a special assessment (including tax) of \$100, on which assessment there are no items of credit, and, under date of July 31, 1933, is correct that with sum of \$100 is still due from defendant. Plaintiff's Exhibit A is not certified with regard to its contents as follows:

Plaintiff's Exhibit A is not certified with regard to its contents as follows:
On or before 30 months from date, for value received, I promise to pay to the order of River Forest Company and the sum of six hundred seventy-five dollars, payable in quarterly installments, with interest on all amounts unpaid at the rate of 6% per annum, as follows:
The principal sum is payable in quarterly installments of fifty dollars (\$50) or more, each with interest of six per cent (6%) per annum, from date stated, on the whole amount of the principal and any unpaid amount from time to time, the first installment to be made due and payable three months after date stated, and the following installments to be made due and payable at intervals of three months thereafter until the full amount of the principal sum shall have been paid.
Default has been made in the payment of any installment exceeding not more than \$10, without notice, at the election of the legal holder thereof, giving priority to the entire amount of the installment owing in full. This note is nonnegotiable.
On the back of the note are endorsements showing six payments of \$50 each made from time to time on the principal sum and also for accrued interest, - the first payment being made on September 24, 1933, and the last on January 22, 1933.
Plaintiff's Exhibit B is a certified copy of the by-laws of

thereto subsequently made. The following are some of the By-Laws:

"Art. III, Sec. 1. The management and control of the Club and of its affairs, expenditures and property shall be vested in seven (7) directors, called the 'Board of Directors,' four (4) of whom shall constitute a quorum. (This section was amended on November 1, 1928, whereby the number of directors was increased to nine, of which five should constitute a quorum.)

Art. IV, Sec. 4. The Secretary shall keep the records of the Club, and of all meetings of the Board of Directors, and its corporate seal, and all documents and records of the Club. He shall also keep a list of its members, and conduct all correspondence except that pertaining to the office of Treasurer. It shall be his duty to mail all notices of the Club to all members thereof, and notices of all meetings of the Board of Directors.

Art. XII (Membership) Sec. 3. No person shall be deemed a regular member until his application shall have been approved by the Board of Directors and the admission fee and dues shall have been paid, and a land purchase and improvement note duly executed and delivered to the Club Treasurer, * * thereupon there shall be issued a certificate and card of membership and the applicant shall thereafter be and become a member with all the rights, privileges and obligations of members thereof.

Art. XVI (Admissions, Dues and Assessments) Sec. 2. The annual dues shall be \$100 per year with war tax additional; \$50 thereof, with war tax additional, shall be due and payable March 1st, and \$50 thereof, with war tax additional, shall be due and payable July 1st of each year. * *

Art. XVI, Sec. 3. No assessment shall be levied against the members of the Club until such assessment shall have been submitted to and approved by a majority of the members present at the annual meeting of the Club or at a regularly called special meeting of the Club, with due notice thereof.

Art. XVI, Sec. 4. Locker fees shall be determined each year by the Board of Directors, and, when assigned, shall be charged to the members. The full amount of the locker fee shall be due and payable March 1st each year.

Art. XVII (Forfeitures) Sec. 1. When the dues or other indebtedness of any member of the Club shall remain unpaid for a period of twenty (20) days after proper notice has been sent, he shall be held to be in arrears, and a second notice shall be mailed to such member by the Treasurer, * * and, if the indebtedness still remains unpaid ten (10) days after the second notice is sent, his membership may be forfeited by the vote of a majority of the Directors present at any regular or special meeting; and such member so delinquent shall then cease to be a member of the Club, and the membership of such member shall become forfeited to the Club, and may be sold or otherwise disposed of by the Club, and the proceeds thereof applied to the liquidation of such indebtedness. Should the amount recovered from such disposition or sale exceed the said indebtedness, said surplus shall be paid to said member. The member thus forfeiting his membership may, upon the payment of all arrears, be reinstated within three (3) months after such forfeiture by a two-thirds vote of the Board of Directors present at such meeting."

Plaintiff's exhibit 6 is a certified copy of the minutes of a special meeting of the members of plaintiff, held on March 29, 1928, (about three months before defendant was admitted as a member of plaintiff club.) From these minutes it appears that 48 members

were present; that upon motion of A. J. Parker, the then secretary of the club, it was ordered that the Board of Directors be authorized to obtain bids from contractors "for the construction of the club house"; that it was further ordered that said Board be authorized to issue debenture notes to the amount of \$150,000 for payment of such construction work and the purchase of certain land; and that it was further ordered in substance that new members be procured and that in addition to paying a membership fee of \$100, each shall be subject to pay a special assessment either in cash or by executing a building and improvement note payable to the Club, etc.

Plaintiff's exhibit 7 is a certified copy of the minutes of a meeting of the board of directors of plaintiff held on June 27, 1928, at which it appears that defendant's application for membership was favorably acted upon and he was duly elected as a member of plaintiff club. Similar action was taken on the applications of six other persons.

Plaintiff's exhibit 8 is a certified copy of the minutes of a special meeting of the members of the club, duly called and held on April 3, 1930. At this meeting it was resolved and ordered by a large majority of the members present that, for the purpose of providing funds for the payment of the indebtedness for the building of the new club house, etc., a special assessment of \$150 (plus war tax of 10%) be levied upon every member; that the same be payable on May 1, 1930, "with the privilege of payment in installments," viz, \$40 before May 1, 1930, and \$11 per month, beginning June 1, 1930, for ten successive months, ^{all} plus war tax.

Defendant was a witness in his own behalf and Dr. D. R. Dawson, formerly a member of plaintiff club and who is a defendant in a similar pending suit brought by plaintiff, also testified. Defendant testified in substance that he joined plaintiff club in June or July, 1928, at the solicitation of A. J. Parker, its then

Plaintiff's exhibit 1 is a certified copy of the minutes of a meeting of the board of directors of Plaintiff held on June 27, 1935, at which it was determined that Plaintiff was a corporation and that it was further ordered in accordance with the provisions of the laws of the State of New York that the corporation be organized and that in addition to paying a membership fee of \$100, each member be subject to pay a special assessment either in cash or by executing a building and improvement note payable to the Club, etc.

Plaintiff's exhibit 2 is a certified copy of the minutes of a special meeting of the members of the club, duly called and held on April 5, 1935. At this meeting it was resolved and ordered by a large majority of the members present that, for the purpose of enabling funds for the payment of the indebtedness for the building of the new club house, etc., a special assessment of \$100 (five per cent of 10%) be levied upon every member; that the same be levied on June 1, 1935, and the proceeds of payment be used for the purpose of paying the indebtedness for the building of the new club house, etc.

Plaintiff's exhibit 3 is a certified copy of the minutes of a meeting of the members of the club, duly called and held on June 1, 1935, for the purpose of levying the special assessment of \$100 per member. Defendant was a witness in his own behalf and Dr. D. B. Jones, formerly a member of Plaintiff club and who is a defendant in a similar pending suit brought by Plaintiff, also testified.

secretary; that he paid his membership fee and dues; that he signed the note (exhibit 4) and thereafter made six payments of \$50 each thereon, together with certain accrued interest; that he continued a member of plaintiff club for about 21 months and until shortly after the special assessment of \$165 (including war tax) was authorized on April 3, 1930; and that during the period of his membership he "played golf on the course perhaps 2 or 3 times a week - Saturdays and Sundays - and sometimes when I got home from work early I would go out in the evenings." Defendant was allowed by the court, over the objection of plaintiff's attorney, to testify as to a conversation he had with A. J. Parker, plaintiff's secretary, just prior to his joining the Club "relative to the terms under which he entered the club." Defendant testified: "When Parker asked me to join the club, I said the only question in my mind was that they were asking so much money. * * Parker replied that if I joined any other golf club (he mentioned two other clubs) I would be charged with assessments, but that if I joined the River Forest Club I would not pay so much more than in other clubs as they would obviate the necessity of ever having to pay any assessments. * * Parker further said that I would not have to pay any assessments. * * And that was the reason I joined the club and signed the note." Defendant further testified that a few days after the authorization of the assessment of April 3, 1930, he received a formal notice thereof, and shortly thereafter met Parker, then the secretary, and had a conversation with him; that "I asked him about the assessment and said I could not pay it unless I had definite assurances that there would be no more assessments, and that I had joined the club with the understanding that there would be no assessments; that Parker replied that he could not help it, that they had to levy the assessment, that they did not get all the

accuracy; that he paid his membership fee and dues; that he signed
the note (exhibit 2) and thereafter made the payments of the same
thereon, together with certain accrued interest; that he continued
a member of said club for about 17 months and until shortly
after the special assessment of \$155 (including war tax) was an-
nounced on April 3, 1933; and that during the period of his member-
ship he "played golf on the course between 2 or 3 times a week -
Saturday and Sunday - and sometimes when I got home from work
early I would go out in the evenings." Defendant was allowed by
the court, over the objection of plaintiff's attorney, to testify
as to a conversation he had with A. J. Parker, plaintiff's brother-
in-law, just prior to his joining the club "relative to the terms
under which he entered the club." Defendant testified: "When
Parker asked me to join the club, I was the only person in my
mind was that they were asking so much money. -- Parker realized
that if I joined my other half (he mentioned the other club)
I would be charged with assessments, but that if I joined the club
I would then I would not pay so much more than in other clubs as
they would obtain the ownership of what he said he was not certain
was, -- Parker further said that I would not have to pay any
assessments -- and that was the reason I joined the club and
signed the note." Defendant further testified that a few days
after the announcement of the assessment of April 3, 1933, he was
called a federal police officer, and shortly thereafter was called
from the precinct, and had a conversation with him, that "I asked
him about the assessment and said I would not pay it unless I had
technical assistance that it would be no more assessments, and that
I had talked the club with the understanding that there would be no
assessments; that Parker replied that he could not help it, that

members they expected, that if I couldn't pay the assessment I could get out of the club, and that when I paid up what I owed they would cancel my membership." Defendant further testified that shortly after this conversation he resigned as a member by letter, and that subsequently he received a letter from the club, signed by Parker as secretary and dated July 16, 1936. This letter, introduced in evidence by defendant, is as follows:

"At a meeting of the Board of Directors last evening your membership in the club was forfeited. There were also ten other names posted, making 11 in all, and all of the 11 were forfeited at the same time. In this list of forfeitures, so far as I am able to judge, the only two that might be construed as having permitted the forfeiture, perhaps somewhat on account of the assessment, were Mr. Childs and Dr. Dawson. * * Letters of notification of forfeiture have been sent to each of the other members, but I should like very much to see you before mailing you any such formal notice, as I believe with your cooperation we can still save the situation."

Dr. Dawson, defendant's witness, testified that he was a member of plaintiff club in 1926 and 1929 and that he was present at a conversation in June, 1926, when Parker solicited defendant to become a member. Upon being asked to state that conversation he was allowed by the court, over the objection of plaintiff's attorney, to testify that "Kinman asked why he should join the club at a higher price than the other clubs, and Parker said that there would be no assessments."

At the conclusion of defendant's evidence plaintiff requested that the hearing be postponed in order that plaintiff might produce Parker as a witness in rebuttal. The court denied the request and, after indicating that under the evidence no recovery should be had by plaintiff and stating "Why should they (the Club) induce him (defendant) to take a membership on the pretext that there would be no assessments and then afterwards levy an assessment", entered the finding and judgment as first above mentioned.

After a careful review of the present transcript we are of the opinion that the judgment in question should be reversed and a

members they expected, that if I couldn't pay the assessment I would
not stay in the club, and that was I said up until I was very
certainly not. Defendant's witness testified that after
after this conversation he remained as a member of the club, and that
subsequently he received a letter from the club, signed by Taylor as
secretary and dated July 15, 1935. This letter, introduced in evi-
dence by defendant, is as follows:

"At a meeting of the Board of Directors held on Tuesday, June
11, 1935, in the club was testified, there were also ten other
members present, making 11 in all, and all of the 11 were testified as
the same time. In this list of 11 members, as far as I was able to
know, the only two that might be considered as having remained in the
club, were defendant and myself. As to the other nine, they were
testified, perhaps defendant as a member of the club, and I as a
member of the club. I believe that the other nine were
members of the club at the time of the meeting, but I should like very
much to see you before making you any such statement, and I
believe with your cooperation we can still make the situation."

Dr. Brown, defendant's witness, testified that he was a
member of plaintiff's club in 1932 and 1933 and that he was present at
a convention in 1934, from which plaintiff testified he was
come a member. Upon being asked to state that conversation he was
allowed by the court, over the objection of plaintiff's attorney, to
testify that "Hinson asked why he should join the club at a higher
price than the other clubs, and Taylor said that there would be no
assessments."

At the conclusion of defendant's evidence plaintiff requested
that the hearing be postponed in order that plaintiff might produce
Taylor as a witness in rebuttal. The court held the request was
often indicating that under the evidence recovery should be had
by plaintiff and stating "Why should they (the club) induce him
(defendant) to take a membership on the pretext that there would be
no assessments and then afterwards levy an assessment", ordered the
finding and judgment as first were mentioned.

new trial had. We think that the court erred in allowing defendant, or the witness, Dr. Dawson, to testify to that portion of the conversation had between defendant and Parker, secretary of plaintiff, shortly before defendant became a member of the club, wherein as claimed Parker represented to defendant that no special assessments would in the future be levied against members. This testimony was an attempt to vary by parol the terms of the written contract which defendant voluntarily entered into with plaintiff, as disclosed by plaintiff's uncontradicted evidence, and was improperly admitted. (See Handley v. Brum, 237 Ill. App. 587, 590; Minadale State Bank v. Lytle, 262 Ill. App. 151, 155; Convert v. Bishop & Babcock Co., 152 Ill. App. 516, 518; Textmeyer v. Nordland, 259 Ill. App. 247, 251). Furthermore, it does not appear that Parker, as secretary of plaintiff, had or was given any authority to make any such representation or promise, as claimed, as an inducement to obtain new members. We have been unable to ascertain from the present transcript the exact amount due from defendant to plaintiff when the present suit was commenced. It seems clear, however, that when defendant resigned as a member in April, 1930, he at least was indebted to plaintiff for his dues for the first half of the year 1930 (\$55) and for locker rent for that year (\$14.00) and upon the balance due upon his note (\$375 and interest thereon). But it does not appear that his membership was forfeited and formal notice of such forfeiture given, or that any sale of that membership was had, or, if had, what was realized by plaintiff therefrom.

The judgment of the municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, J., concurs.

Kerner, P. J., took no part in the decision.

new trial had. We think that the court acted in allowing defendants
or the witness, Dr. Rowson, so easily to that portion of the con-
tention had between defendant and Barker, secretary of plaintiff,
shortly before defendant became a member of the club, which as
claimed Barker represented to defendant was no special arrangement
would in the future be leveled against members. This testimony was
an attempt to vary by parol the terms of the written contract which
defendant voluntarily entered into with plaintiff, as discussed by
plaintiff's corroborated witness, and was properly excluded.
1925 Jackson v. Brock, 127 Ill. App. 2d 101, 102; Jackson v. Brock, 127
Ill. App. 2d 101, 102; Jackson v. Brock, 127 Ill. App. 2d 101, 102.
1925 Jackson v. Brock, 127 Ill. App. 2d 101, 102; Jackson v. Brock, 127
Ill. App. 2d 101, 102; Jackson v. Brock, 127 Ill. App. 2d 101, 102.
Furthermore, it does not appear that Barker, as secretary
of plaintiff, had or was given any authority to make any such rep-
resentation or promise, as claimed, as no defendant is shown to
members. We have been unable to ascertain from the present trans-
cript the exact amount due from defendant to plaintiff when the
present suit was commenced. It seems clear, however, that when de-
fendant resigned as a member in April, 1920, he at least was in-
debted to plaintiff for his dues for the first half of the year
1920 (\$25) and for locker rent for that year (\$12.50) and upon the
balance due him (BARKER and Jackson's account), but it does
not appear that his membership was forfeited and hence notice of
such forfeiture given, or that any sale of such membership was had,
or, if had, what was received by plaintiff therefrom.
The judgment of the municipal court is reversed and the
cause remanded.

REVEREND AND HONORABLE,

Respectfully,
Your obedient servant,
J. H. ...

35453

RUSSELL FIREBAUGH, TRUSTEE,
Appellee,

v.

LILLIAN H. BRAUDE et al.,
Defendants.

FREDERICK B. KELLER and
EDITH H. KELLER,
Appellants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

267 I.A. 623³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Frederick B. Keller and Edith H. Keller, two of the defendants below, hereinafter called the appellants, from a decree of foreclosure and sale of certain real estate situated in Oak Park, Illinois. The master to whom the cause was referred recommended a decree of foreclosure as prayed in the amended and supplemental bill. Exceptions to the master's report were overruled and a decree, in accordance with the recommendations of the master, was entered.

The original indebtedness was \$105,000, represented by 350 bonds, all of which were dated January 20, 1928, signed by Frederick B. and Edith H. Keller, appellants, payable to bearer, the bonds being numbered serially and being for different amounts. By their terms they matured on different dates, from January 20, 1930, to January 20, 1936, when the entire issue would become due and payable. The bonds were secured by a trust deed given to Russell Firebaugh, trustee, complainant, who was the president of the Bond & Mortgage Company, which undertook, by the terms of a contract of the same date, to underwrite and dispose of the

1012

GEORGE T. HARRIS, TRUSTEE,
Appellee.

v.

EDWARD M. HARRIS of et al.,
Appellants.

EDWARD M. HARRIS and
JOHN M. HARRIS,
Appellants.

APPEAL FROM CIRCUIT
COURT, EAST TENNESSEE.

287 L.A. 623

MR. JUSTICE McREYNOLDS DELIVERED THE OPINION OF THE COURT.

This is an appeal by Frederick B. Keller and Edith M.

Keller, two of the defendants below, respondents, against the

appellants, from a decree of foreclosure and sale of certain
real estate situated in Oak Park, Illinois. The matter is now

the cause was referred recommended a decree of foreclosure as
proper in the manner and supplemented bill. Respondents as the

mortgage's report were overpaid and a decree, in accordance with

the recommendation of the master, was entered.

The original indebtedness was \$100,000, represented by

250 bonds all of which were dated January 30, 1914, signed by

Frederick B. and Edith M. Keller, appellants, payable to order,

the bonds being numbered serially and being for different amounts.

By their terms they matured on different dates, from January 30,

1915, to January 30, 1925, when the entire loan would become due

and payable. The bonds were secured by a first lien given to

Edward M. Harris, trustee, respondent, and was the president

of the First & Merchants Company, which matured, by the terms of

bonds.

The appellants contend that "the court erred in overruling the defense of usury and in not ordering an accounting between the Bond & Mortgage Co. and the Kellers." They concede that this is their major contention. The master found "that the question of usury was raised in this case in behalf of some of the defendants for the difference between the face value of said bonds of \$105,000 and ninety-two per cent thereof, the amount for which said bonds were sold by the mortgagors, Frederick B. and Edith H. Keller, to the Bond & Mortgage Company; that the contract for construction bond issue with Bond & Mortgage Co. and the makers of said bonds, in evidence as Complainant's Exhibit 4 of October 16, 1930, shows that the transaction was not a mere loaning of money but in the nature of an underwriting agreement and as such does not come within the category of a person loaning his own money; that the security for the property described in the trust deed was not a fully completed enterprise; that the bonds described in the trust deed were to be sold and money obtained so that the mortgagors could erect and maintain a building to be constructed on the land in question; that in and by said contract for construction bond issue provision was made that trustee should from time to time apply moneys received for the payment of bills incurred in the erection of the improvement; that this was done in accordance with the direction of Frederick B. and Edith H. Keller and Fred Heuberger, their agent, including the sum of \$13,278.72 of moneys derived from sale of bonds to clear the title to the land upon which the building was to be erected and that the bonds referred to were disposed of under sales agreement between the Bond & Mortgage Co. and Frederick B. and Edith H. Keller; that in and by said bond sales agreement the Bond &

Exhibit

The appellants contend that "the court erred in over-
 ruling the defense of usury and in not ordering an accounting
 between the Bond & Mortgage Co. and the appellees." They contend
 that this is their major contention. The master found "that the
 question of usury was raised in this case in behalf of some of
 the defendants for the difference between the face value of said
 bonds of \$100,000 and ninety-two per cent thereof, the amount for
 which said bonds were sold by the mortgagee, Frederick B. and
 William H. Keller, to the Bond & Mortgage Company; that the contract
 for construction bond issue with Bond & Mortgage Co. and the

holders of said bonds, in evidence as complainant's Exhibit 4 of
 October 16, 1930, shows that the transaction was not a mere loaning
 of money but in the nature of an underwriting agreement and as such
 does not come within the category of a loan. Further, the master
 found the property for the property situated in the tract sold was
 not a fully completed enterprise; that the bonds described in the
 tract sold were to be sold and money advanced to that the mortgagee
 would erect and maintain a building to be constructed on the land.
 In question, that in and by said contract for construction bond
 issue provision was made that interest should then be the only
 money received for the payment of bills incurred in the execution of
 the improvement; that this was done in accordance with the decision
 of Frederick B. and William H. Keller and Fred Hensinger, their agents,
 including the sum of \$15,288.75 of money derived from sale of
 bonds to clear the title to the land upon which the building was to
 be erected and that the bonds referred to were disposed of under
 sales agreement between the Bond & Mortgage Co. and Frederick B. and
 William H. Keller; that in and by said sales agreement the Bond &

Mortgage Co. agrees to buy and Frederick B. and Edith H. Keller agree to sell the bonds in question for ninety-two per cent of their face value; that said bonds were sold to different purchasers in different denominations at great expense to salesmen, advertising and other items incident to the sale of building construction bonds; that the bonds were payable to bearer and became the property of purchasers of such bonds; that it is clear it was the intention of the parties that the transaction was not a loaning of money to mortgagors but an underwriting agreement; that the purchase of the bonds at price mentioned was a mere discount and reasonable, as it was necessary to ascertain the condition of the building from time to time and progress made in erection and construction; to take waivers of liens and affidavits in accordance with the lien act; that it was necessary to make an inspection of the building so that there would be no excess paid for labor and material that went into construction thereof; that the evidence offered before the Master and exhibits in corroboration thereof conclusively show that ninety-two per cent, or \$96,600, was expended in the construction of the building on the premises herein involved; that of the eight per cent discount four per cent was expended for selling expense and the remainder for services rendered and to be rendered in the construction of the building; that every detail in connection with the agreement for construction bond issue and trust deed was carried out by Bond & Mortgage Co. and Russell Firebaugh, as trustee, and that the defendants Frederick B. and Edith H. Keller and Fred Heuberger are not entitled to make the defense of usury."

The written agreement between the Bond & Mortgage Company and the Kellers for a construction bond issue, dated January 20, 1928, is in all material respects the same as the one that was considered by the court in Firebaugh v. Seegren, 265 Ill. App. 381, and

Wardrobe Co. agreed to buy and Frederick H. and William H. Miller

agreed to sell the bonds in question for ninety-two per cent of

their face value; that said bonds were sold in different lots

in different denominations at great expense to salesman, advertising

and other items incident to the sale of building construction bonds;

that the bonds were payable to bearer and became the property of

Frederick H. and William H. Miller; that it is clear that the intention

of the parties that the transaction was not a loan of money to

Wardrobe Co. but an underwriting agreement; that the purchase of

the bonds at price mentioned was a mere discount and commission;

as it was necessary to ascertain the condition of the building

from time to time and progress made in erection and construction;

in the delivery of bonds and certificates in accordance with the time

and that it was necessary to make an inspection of the building so

that there would be no error paid for labor and material and that

the construction thereof; that the evidence taken before the

Master and verified in accordance with the evidence taken that

ninety-two per cent, or \$92,000, was expended in the construction

of the building on the premises herein involved; that at the time

the bonds were sold the price was ninety-two per cent of the face

and the remainder for services rendered and to be rendered in the

construction of the building; that every dollar in connection with

the transaction was accounted for and that the same was

not by Ward & Wardrobe Co. and Frederick H. and William H. Miller, and

that the defendant Frederick H. and William H. Miller and Fred

Wardrobe are not entitled to make the defense of usury.

The written agreement between the Ward & Wardrobe Company

and the Miller for a construction bond issue, dated January 20,

1902, in its entirety purports the same as the one that was con-

differs from it only as to dates, amounts, descriptions, and the like. The printed matter and all undertakings pertinent to the question of usury are the same in both agreements. In Firebaugh v. Seegren, supra, the court states that "the mere verbal raiment in which an agreement is clothed will not be permitted to hide the real character of the transaction, and no device will be allowed to cover up its real character. Therefore, the courts hear extrinsic evidence and resort to parol evidence for the purpose of determining the actual fact as to whether there has been an intentional violation of the statute, the purpose of which is to prevent extortion, wrong and oppression. The defense, however, is an affirmative one, and the defense must be established by clear and convincing evidence," and holds that the agreement in that case was an underwriting contract; that "the purpose of this agreement was to secure the sale of defendants' bonds to the public and that the discount allowed upon the purchase price of the bonds was compensation for the services to be rendered in that respect, seem to be borne out by all the facts and circumstances which appear in the case, namely, that the bonds were so disposed of through the efforts and the services of the Bond and Mortgage Co., and that under the terms of this contract the Bond and Mortgage Co. was absolutely held to a purchase of the same at this price, which would guarantee to defendants the sale of these bonds and the receipt by them of the money needed in order to pay off the old loan. There is no evidence tending to show that there was anything unusual or oppressive about the agreement; that the services were not performed nor of the value represented by the discount allowed. * * * We therefore hold that there was no usury in this transaction." In the instant case the master admitted parol evidence for the purpose of determining the actual nature of the agreement, and he found that "said bonds

deliver them is only as to date, amount, description, and the
 item. The printed matter and all accompanying documents to
 the question of money and the same in both agreements. In
 "Hess v. Hess" the court stated that "the mere verbal
 statement in which an agreement is stated will not be permitted
 to hide the real character of the transaction, and no party will
 be allowed to cover up its real character. Therefore, the court
 must estimate evidence and decide its proper evidence for the purpose
 of determining the actual fact as to whether there has been an
 intentional violation of the statute, the purpose of which is to
 prevent extortion, wrong and oppression. The defense, however, is
 an affirmative one, and the defense must be established by clear and
 convincing evidence," and held that the agreement in that case was
 an unenforceable contract; that "the purpose of this agreement was
 to secure the sale of defendant's bonds to the public and that the
 defense allowed upon the purchase price of the bonds was compensation
 for the services to be rendered in that respect, and to be borne out
 by all the facts and circumstances which appear in the case, namely,
 that the bonds were so disposed of through the efforts and the
 services of the bond and mortgage men and that under the terms of
 this contract the bond and mortgage men were absolutely held to a
 purchase of the same at this price, which would guarantee to defendant
 the sale of these bonds and the receipt by them of the money needed
 in order to pay off the old loan. There is no evidence tending to
 show that there was anything unusual or oppressive about the agree-
 ment; that the services were not performed nor of the value
 represented by the discount allowed. * * * We therefore hold that
 there was no fraud in this transaction." In the instant case

were sold to different purchasers in different denominations at great expense to salesmen, advertising and other items incident to the sale of building construction bonds; that the bonds were payable to bearer and became the property of purchasers of such bonds; that it is clear it was the intention of the parties that the transaction was not a loaning of money to mortgagors but an underwriting agreement; that the purchase of the bonds at the price mentioned was a mere discount and reasonable; * * * that every detail in connection with the agreement for construction bond issue and trust deed was carried out by Bond & Mortgage Co. and Russell Firebaugh, as trustee." These findings of the master are fully justified by the proof. The Supreme court refused a certiorari in Firebaugh v. Seegren, supra, and under the ruling therein and the facts in the instant case, we hold that the agreement of January 20, 1928, was an underwriting contract; that the services were performed by the Bond & Mortgage Company; that there is no evidence that would warrant a finding that there was anything unusual or oppressive about the agreement, and that the defense of usury interposed by the appellants was not proven. In re Danville Hotel Co., Inc., 33 Fed. (2d) 162, 174, a late decision, is in accord with Firebaugh v. Seegren, supra. The appellants seek to avoid the effect of the agreement of January 20, 1928, by contending that the loan was made under an "original application contract," known as Kellers' Exhibit 1 of July 23, 1930, also referred to as the "blue agreement," and that the usurious nature of the contract is shown by that exhibit. It is sufficient to say, in reference to that exhibit, that the master was fully warranted in concluding that no such agreement was executed by the parties, and that the agreement of January 20, 1928, was executed by the parties and binding upon them. From what we have said, however, we do not wish to be understood as holding or intimating that Kellers' exhibit 1 of July 23, 1930, shows upon

were sold to different purchasers in different circumstances of
time and place, and the same time limited to
the sale of building construction bonds; that the bonds were payable
to bearer and became the property of purchasers of such bonds; that
it is clear it was the intention of the parties that the transaction
was not a loaning of money to mortgagee but an investment of money
and that the purchase of the bonds of the parties mentioned was a
mere discount and redemption; * * * that every detail in connection
with the agreement for construction bonds issued and paid back was
carried out by Bond & Mortgage Co. and Russell Trust Co., as trustees.
These findings of the master are fully justified by the proof. The
supreme court refused a reversal in Highland v. Highland, 1907, 100
and under the ruling therein and the facts in the instant case, we
hold that the agreement of January 20, 1903, was an unrevocable
contract; that the parties were induced by the Bond & Mortgage
Company; that there is no evidence that would warrant a finding that
there was anything unusual or suspicious about the agreement, and
that the defense of undue influence is not available to the appellants and that
the Highland v. Highland, 1907, 100, is a binding precedent, a final decision,
and is not overruled by Highland v. Highland, 1907, 100. The appellants seek
to avoid the effect of the agreement of January 20, 1903, by contending
that the loan was made under an "original application contract," known
as Highland v. Highland, 1907, 100, also referred to as the "first
contract," and that the contract between the parties is void as
being illegal. It is well settled by the law that a contract is void as
being illegal, and the master was fully warranted in concluding that no such agreement
was entered into by the parties, and that the agreement of January 20,
1903, was entered into by the parties and binding upon them. Even when
it is held that a contract is void as being illegal, it is not void as being

its face a usurious contract. It contains the following: "I hereby agree to sell to you, First Mortgage Gold Bonds of the par value of One Hundred and Five Thousand Dollars at a discount of eight (8) per cent and accrued interest. * * * In consideration of your purchasing said bond issue, I further agree to pay you cost of preparing said issue ready for resale." While the pertinent provision in this document is stated in general terms, nevertheless, it is clear that the document does not "show upon its face a usurious contract," and if it be construed in the light of the subsequent conduct of the parties, it would, in our judgment, be held to be an underwriting contract. In any event, the facts show clearly that this exhibit was not the contract of the parties.

Other contentions are raised by the appellants, but counsel for the appellants has admitted to the court that they are of a somewhat technical nature. We shall, however, refer to several.

The appellants contend that "the court erred in overruling the defense of usury and in not ordering an accounting between the Bond & Mortgage Co. and the Kellers." This contention is necessarily based upon the assumption that the defense of usury was proven, and our ruling in respect to the first contention disposes of the instant one.

The appellants contend that the "appointment of a receiver herein was improper and that the funds turned over by the receiver to the Clerk of the Circuit Court rightfully belong to defendants and such funds should be turned over to the Kellers." The appellants insist that "there is nothing in either the petition or the so-called supplemental and amended bill of complaint alleging that the property covered by the trust deed is other than good security for

the fact a contract was made. It contains the following:

Whereas upon the 10th day of May, 1904, the following

parties of the United and Five thousand dollars of a discount

of eight (8) per cent and accrued interest. * * * in consideration

of your purchasing said bond issue, I further agree to pay you

the sum of \$100,000.00 less your interest. This is the substance

provision in this document is stated in general terms, nevertheless

it is clear that the document does not "show upon its face a contract

contract," and it is so construed in the light of the surrounding

circumstances of the parties, it would, in our judgment, be held to be an

underlying contract. In my view, the facts show clearly that

this contract was not the subject of the parties.

Other contents are stated by the applicant, but

because the applicant has admitted to the court that they

are of a somewhat technical nature, we shall, however, refer

to them.

The applicant claims that the contract was in violation

of the laws of the State and is not enforceable under the

laws of the State of New York. This contention is necessary

to show that the applicant was not the owner of the property, and

was selling in violation of the laws of the State of New York.

Under the

The applicant contends that the "agreement of a receiver

was not a contract and that the same cannot be enforced by the courts of

the State of New York. This contention is necessary to show that

the applicant was not the owner of the property, and was selling in

violation of the laws of the State of New York. This contention is

necessary to show that the applicant was not the owner of the property,

and was selling in violation of the laws of the State of New York.

the indebtedness thereby secured, nor is there anything in the pleadings as to the value of the land and the value of the improvements. It is therefore apparent that the receiver was improperly appointed." It is difficult to believe that this contention is seriously made. It does not appear that the appointment was made solely on the ground that the security was scant and insufficient. After the original bill was filed and before the motion for the appointment of a receiver, complainant presented an amended bill for foreclosure and a verified petition praying for the appointment of a receiver, from which it appears, inter alia, that complainant had made numerous and diligent efforts to collect the rents from the tenants but had not been able to collect any from them "and that a chaotic condition exists among the tenants on account of the demands made by the owners of the equity and their agents for rents and the demands made by your orator, as trustee, on said tenants that they pay rents to him as trustee, and that some of the tenants are not paying rent at all and will not pay rents until a receiver is appointed, or until a court order is entered settling the dispute as to whom they should pay rents." It is clear from the record that one of the reasons the chancellor appointed the receiver was to prevent waste and to bring about a collection of rents during the pendency of the proceedings. No appeal was taken by anyone from the order of appointment. The receiver functioned for more than a year, when it ceased to conduct the business of a trust company on account of its insolvency. It appears that the receiver acted without objection from any of the defendants. After the receiver became insolvent, it, in compliance with an order entered, paid to the clerk of the court the funds which it had collected, and thereupon it was discharged as receiver. The order contained an express provision that the fund be held subject to the further order of the court. The

the respondents' answer, but in their answer to the
 questions as to the value of the land and the value of the improve-
 ments, it is therein alleged that the answer was properly
 appointed. It is difficult to believe that this contention is
 actually made. It does not appear that the appointment was made
 solely on the ground that the answer was incomplete.
 After the original bill was filed and before the motion for the
 appointment of a receiver, defendant's answer was amended and the
 forcefulness and a verified petition praying for the appointment of
 a receiver, from which it appears, that after the appointment was
 made numerous and diligent efforts to collect the rents from the
 tenants but had not been able to collect any from them and that
 a chaotic condition exists among the tenants on account of the
 demands made by the owners of the equity and their agents for rents
 and the demands made by your client, as trustee, on said tenants
 that they pay to him as trustee, and that some of the demands
 are not being paid at all and will not be paid until a receiver
 is appointed, or until a court order is entered requiring the dispo-
 sit of the rents and the receiver appointed the receiver was to
 prevent waste and to bring about a collection of rents during the
 pendency of the proceedings. No appeal was taken by anyone from the
 order of appointment. The receiver's answer for rents from a year
 and is asked to appoint the receiver as a trustee company or receiver
 of the property. It appears that the receiver was appointed
 objection from any of the defendants. After the receiver's
 appointment, it is complained with an order entered, held to the clerk
 of the court the funds which it has collected, and thereupon it was
 appointed as receiver. The court appointed an receiver

premises are not now in receivership. If the appellants have any interest in the fund now on deposit with the clerk of the court, they may by apt proceedings assert it.

The appellants contend that "the allowance of \$7,500 solicitor's fees is improper and excessive." In support of this contention they argue (a) that the complainant was not entitled to any solicitor's fees "because he failed to sustain his right to foreclose upon the allegations contained in the so-called supplemental and amended bill," and (b) that in any event \$7,500 was an excessive amount to allow as solicitor's fees. We have carefully considered the extremely technical argument in support of the claim that the complainant was not entitled to foreclosure upon the pleadings and the facts, and we are satisfied that it is devoid of real merit. We have also carefully considered the findings of the master in respect to the allowance of solicitor's fees and we are satisfied that he was justified, under all the circumstances of the case, in recommending the allowance of \$7,500. The complainant strenuously argues that an inspection of the record "will disclose tactics on the part of solicitors for defendants calculated merely to obstruct and impede the hearings and to add to the burden of presenting the case for complainant." Without passing upon the merits of this argument, we feel fully justified in saying that an examination of the very large record before the master shows plainly how bitterly and persistently the appellants fought every step of the proceedings. Counsel for the appellants frankly concede that they have not hesitated to take advantage of technical defenses, but they justify their conduct in that regard upon the ground that they were satisfied that the defense of usury was a meritorious one and that if that defense had been sustained the complainant would not be entitled to

On 11/11/11, I was contacted by a person who was

These data indicate that the model is able to predict the effect of the different parameters on the system response.

at London that night, and, moreover, admitted to my presence.

WILLIAM J. BROWN

the application of the same principle to the study of the human mind.

Recent before the number above slightly has slightly and possibly

There is a very large number of people who are not interested in the subject of the book.

"The following information was obtained from the records of the Bureau of Census, Department of Commerce, Washington, D.C., dated 10-1-68:

The findings are in line with the findings of previous research that the use of the

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an investigation of the forest "will disclose whether or not the

and allowed to dry. The resulting product was a white solid.

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to which the system of belief of common sense is attached

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950, and the majority of this increase has been in urban areas. This has led to a concentration of population in a few large cities, which has in turn led to a number of problems, such as overcrowding, pollution, and traffic congestion.

— 624 —

○ 1949 年 10 月 1 日 中华人民共和国成立

76. *Quercus agrifolia* Nutt. - *Q. agrifolia* Nutt. - *Q. agrifolia* Nutt.

... ..

[Faint handwritten notes at the bottom of the page]

foreclosure of the premises.

We have carefully considered several other contentions raised by the appellants and find them to be without substantial merit.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

Kerner, P. J., and Gridley, J., concur.

35724

E. M. GATTIN & CO., a corporation,
Appellee,

v.

JAMES STANLEY JOYCE,
Appellant.

146 7
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

267 I.A. 623⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This was a suit in assumpsit, tried by the court, without a jury. At the conclusion of the evidence the issues were found for the plaintiff and its damages were fixed at \$16,738.50. From a judgment entered upon the finding the defendant has appealed.

The plaintiff first sued on the common counts, to which was attached an affidavit of claim, wherein it was stated "that the demand of the plaintiff * * * is for four items of jewelry sold and delivered to the defendant by the plaintiff at defendant's special instance and request in April and October, 1928, in the total sum of \$24,513.50; that defendant paid it the total sum of \$7,775.00 * * * and that there is due to the plaintiff from the defendant after allowing to defendant all just credits, deductions, and set-offs, the sum of \$16,738.50." afterwards, by leave of court, the plaintiff filed two additional counts. The first alleges that on April 5, 1928, the defendant "was lawfully wedded to and the lawful husband of Mrs. J. Stanley Joyce, his wife, and while so married to her as aforesaid kept and maintained her in and with dignity suitable to her social rank and station and furnished her with all necessaries suitable to the maintenance of herself in her

14

ATTEST: JOHN W. HARRIS

CLERK, COURT HOUSE

267 I.A. 623

J. M. GATTIN & CO., a corporation,
Appellee.

JAMES STEADLEY JONES,
Appellant.

IN SENATE, FEBRUARY 1938, THE COURT OF THE COUNTY

This was a suit in remission, tried by the court.

without a jury. At the conclusion of the evidence the issues

were found for the plaintiff and the damages were fixed at

\$10,750.00. From a judgment entered upon the finding the

defendant has appealed.

The plaintiff first sued on the common counts, to which

was attached an affidavit of claim, wherein it was stated "that

the demand of the plaintiff * * * is for four items of jewelry sold

and delivered to the defendant by the plaintiff at defendant's

special instance and request in April and October, 1933, in the

total sum of \$26,513.80; that defendant paid it the total sum of

\$7,770.00 * * * and that there is due to the plaintiff from the

defendant after allowing to defendant all just credits, interest,

and costs, the sum of \$18,743.80." Thereafter, by leave of

court, the plaintiff filed two additional counts. The first alleges

that on April 2, 1933, the defendant "was lawfully wedded to and

the lawful husband of Mrs. J. Steadley Jones, his wife, and while so

married to her an otherwise kept and maintained her in and with

illicitly amicable to her social rank and station and furnished her

social rank and station; that on April 5, 1928, the said wife of the defendant herein, as necessary for her personal adornment fitting and becoming her station and rank and position in social life, purchased from the plaintiff upon the credit of the defendant, and the plaintiff sold and delivered to the said wife upon the credit of the defendant, two bracelets and items of jewelry of the value and price of \$22,000; that thereafter, on the 14th day of October, 1928, the said wife again purchased from the plaintiff, and the plaintiff sold and delivered to the said wife upon the credit of the defendant herein, an emerald and diamond brooch of the market value and price of \$6,500 and enameled a pin of the said wife, in the sum of \$13.50, which items of adornment and jewelry were necessities fitting and due the rank, position and standard of living, of society of the said wife of the defendant herein as aforesaid, and were necessary for the proper circumstance and condition of her life and well being; that the said defendant although repeatedly requested, has failed and refused to pay the balance remaining in the sum of \$16,738.50." The second additional count contains the same allegations as the first additional count, and also alleges that "the defendant promised and agreed to pay the plaintiff the said sums aforesaid and that thereafter by due and proper payments paid on account of the aforesaid purchases, the total sum of \$7,775, and that after allowing to the defendant all due, and just credit and set off there remains due and owing the plaintiff the total sum of \$16,738.50; that the said defendant although repeatedly requested has failed and refused to pay the balance remaining in the sum of \$16,738.50." The defendant filed the general issue, and an affidavit of merits, made by John P. Gregg, in which he says that "he is the duly authorized agent in this behalf of the defendant, and that he has knowledge of the facts and

...and ... the said wife of ...
the defendant herein, as necessary for her personal ...
and ... her station and rank and position in social life, ...
changed from the plaintiff upon the credit of the defendant, and the
plaintiff sold and delivered to the said wife upon the credit of
the defendant, two bracelets and items of jewelry at the value and
price of \$23,000; that thereafter, on the 14th day of October, 1920,
the said wife again purchased from the plaintiff, and the plaintiff
sold and delivered to the said wife upon the credit of the defendant
herein, an emerald and diamond brooch of the market value and price
of \$4,500 and encased a pin of the said wife, in the sum of \$13.50,
which items of defendant and jewelry were ...
and the rank, position and standard of living, of society of the said
wife of the defendant herein as aforesaid, and were necessary for
the proper circumstances and condition of her life and well being;
that the said defendant although repeatedly requested, has failed and
refused to pay the balance remaining in the sum of \$14,758.50. The
defendant ... the same ... of the ...
additional counts, and also alleges that "the defendant promised and
agreed to pay the plaintiff the said sum of \$14,758.50 and that ...
after by the said proper ... the ...
promises, the total sum of \$7,775, and that after allowing to the
defendant all ... and that ... and not all there remains due and
owing the plaintiff the total sum of \$14,758.50; that the said
defendant although repeatedly requested has failed and refused to pay
the balance remaining in the sum of \$14,758.50." The defendant
that the ... and an ... of ... named by John B.
... in which he ... that he ...
... of the defendant, and that he has knowledge of the facts and

that he verily believes that the defendant has a good defense to this suit upon the merits to the whole of the plaintiff's demand; * * * denies that the plaintiff in the above entitled cause sold and delivered to the defendant at the defendant's specific instance and request four items of jewelry in April and October, 1928; * * * denies that the defendant purchased any jewelry from the plaintiff in the year 1928; * * * denies that the defendant is indebted to the plaintiff in the sum of \$16,738.50, or in any sum whatsoever." Afterwards, by leave of court, the defendant filed an additional plea to the second additional count of the declaration, in which he sets up the Statute of Frauds.

The plaintiff is a jewelry firm doing business on Fifth avenue in the city of New York. Nelle Joyce was married to the defendant on November 29, 1926. When the plaintiff offered to prove that at the time of the marriage the defendant owned large tracts of timber land, manufactured lumber, railroad property, stocks and bonds of various kinds, "which in all amounted in money to about \$2,500,000," counsel for the defendant stated that the defendant would admit "that he was worth approximately that." The plaintiff further proved, by John P. Gregg, that Gregg was the accountant and office manager of the defendant, that he was quite familiar with the financial condition of the defendant from time to time, and that there was no substantial change in the defendant's financial condition between the fall of 1926 and the early part of 1928. The defendant maintained a home in Chicago and also "a large residence on the bay front in Miami," Florida. In the year 1926 he allowed his wife, for her personal expenses, \$1,000 a month; in 1927 a total of \$19,000, and in 1928 a total of \$18,800. In the first half of 1929 he allowed her a total of \$6,000 and also paid \$14,000 for an automobile for her. In 1926 he gave her an emerald and diamond bracelet that cost him \$8,550, and in December, 1927, he

[illegible]

had it reset at an additional cost to him of \$2,500. In May, 1927, he gave her a diamond ring costing, with the setting, \$23,000. In the summer of 1929 Mr. and Mrs. Joyce separated and divorce proceedings were then brought in this county by Mrs. Joyce. Prior to the time of her marriage to the defendant she had an account with the plaintiff company, but "it was not very much of an account," "just small things, repairs and so on. * * * She never had anything important with us." Mr. Gattle testified that she never asked for any credit in excess of \$20. There is no proof that she had any means of her own. Her birthday is April 9. She testified that a few days prior to her birthday in 1928 she had a telephone conversation with her husband in which she reminded him that her birthday was April 9 and told him that as soon as she arrived in New York she was going over to the plaintiff's place of business and pick out a birthday present, to which statement the defendant laughingly replied, "Well, don't buy out the store," or words to that effect. Mrs. Joyce arrived in New York City on April 2, 1928, and registered at the Ambassador hotel. The next day she went to the plaintiff's place of business and told Mr. Gattle that her husband was to join her in New York very shortly; that her birthday was near and she was in New York to pick out a birthday present, to which Mr. Gattle responded that he was perfectly delighted to have an account with the defendant in his store, and that Mrs. Joyce, as the wife of the defendant, could have the whole store if she wanted it, because he knew the defendant was good for anything in the jewelry line that she would buy. Mrs. Joyce further testified that she then picked out the two bracelets in question and took them away on approval, and not as a purchase; that the defendant joined her at the Ambassador hotel on April 7, 1928, and that she showed him the bracelets and told him that she had picked them out as her present, and also told him the price; that she also stated to him that she had them on approval "until

and is used as an additional note to him of \$2,500. In May, 1937,
he gave her a diamond ring costing, with the setting, \$400.00. In
the summer of 1938 Mr. and Mrs. Joyce separated and divorce proceedings
were then brought in this county by Mrs. Joyce. Prior to the time of
her marriage to the defendant she had an account with the plaintiff's
company, but "it was not very much of an account," "just small
things, repairs and so on." She never had anything important with
her. Mrs. Galtie testified that she never asked for any credit in
excess of \$20. There is no proof that she had any money at her own.
Her birthday is April 8. She testified that a few days prior to her
birthday in 1938 she had a telephone conversation with her husband in
which she reminded him that her birthday was April 8 and told him that
as soon as she arrived in New York she was going over to the plaintiff's
place of business and pick out a birthday present, to which statement
the defendant laughingly replied, "Well, don't buy me the stars,"
or words to that effect. Mrs. Joyce arrived in New York City on
April 8, 1938, and registered at the Ambassador Hotel. The next
day she went to the plaintiff's place of business and told Mr. Galtie
that her husband was to join her in New York very shortly; that her
birthday was near and she was in New York to pick out a birthday
present, to which Mr. Galtie responded that he was positively delighted
to have an account with her restaurant in his name; and that Mrs. Joyce
as the wife of the defendant, would have the same status if she wanted
it, because he was the defendant and was the husband in the family.
At this time she would buy. Mrs. Joyce further testified that she then
picked out the two bracelets in question and took them away on a subway,
and not as a purchase; that the defendant joined her at the restaurant
until on April 7, 1938, and that she asked him the bracelets and told
him that she had taken them but he had returned, and also told him the

such times as he would give me his consent to keep them;" that the defendant "was much delighted with them. He thought they were very beautiful but if that was what I wanted he would buy them for me as my birthday present;" that following this conversation she went back to the plaintiff's store and told Mr. Gattle that her husband had consented to her keeping the bracelets and she "left them there for charge;" that in the fall of 1928 she bought from the plaintiff the brooch in question; that she first took it out "on memorandum" to show to the defendant; that she had on different occasions prior thereto expressed a desire to the defendant for a brooch and that he had made no objections to her having one; that when she took the brooch "on memorandum" from the plaintiff company she showed it to the defendant and he admired it very much and said that if she wanted it she could have it; that she then went back to the plaintiff and told Mr. Gattle that the defendant had given his consent to the purchase and that she would keep the brooch; that from that time on she had it in her possession and the defendant saw it many times. The articles in question were charged on the books of the plaintiff company to Mrs. Joyce. Mr. Gattle testified, inter alia, that the credit was extended to the defendant; that most of the accounts of his firm were in the names of the wives of the respective husbands to whom credit had been extended. It further appears in evidence that the defendant took out a "jewelry floater insurance policy" in 1927, in which the assured are "James Stanley Joyce and/or Nellie Maize Joyce," and which covered a number of very valuable pieces of jewelry, and that on June 18, 1928, he had a rider in the amount of \$22,500 attached to the policy, to cover the two bracelets purchased from the plaintiff. Following the sale, the plaintiff received from the defendant on account of the purchases the following checks, each signed by the defendant:

each time as he would give me his consent to keep them; that the
defendant was much delighted with them. He thought they were very
beautiful and it was when I wanted he would buy them for me as
my birthday presents; that following day, defendant and some other
to the plaintiff's home and told Mr. Galt that her husband had
consented to her keeping the bracelets and also "let's them down for
change"; that in the fall of 1935 she bought from the plaintiff the
diamond in question; that she first took it out "on occasion" as when
to the defendant; that she had on different occasions given jewelry
expressed a desire to the defendant for a bracelet and that he had made
no objection to her having them; that when she had the bracelet
mentioned, from the plaintiff company she showed it in the defendant's
and he wanted it very much and said that if she wanted it she could
have it; that she then went back to the plaintiff and told Mr. Galt
that the defendant had given his consent to the purchase and that she
would keep the bracelet; that from that time on she had it in her
possession and the defendant saw it many times. The articles in
question were changed on the books of the plaintiff company to Mrs.
J. W. Galt as testified, which also, that the credit was extended
to the defendant; that most of the accounts of his firm were in the names
of the wife of the respective husbands as they would have been authorized.
It further appears in evidence that the defendant took out a "Jewelry
Insurance Insurance Policy" in 1937, in which the amount was "Jewelry
Jewelry Jewels and/or Relics Relics Jewels", and which covered a number
of very valuable pieces of jewelry, and that on June 12, 1938, he had
a rider in the amount of \$25,000 attached to the policy, to cover the
two bracelets purchased from the plaintiff. Following the sale, the
plaintiff received from the defendant on account of the purchase the
following check, was signed by the defendant:

| | |
|---|-----------|
| "August 8th, 1928, drawn on the Illinois Merchants Trust Co. Chicago, Ill. | \$2000.00 |
| Dec. 13th, 1928, drawn on the Continental & Commercial National Bank, Chicago | 1000.00 |
| March 6th, 1929, on the same bank as above | 1000.00 |
| June 15th, 1929, on the same bank as above | 2500.00 |

The witness Gregg testified that in addition to his duties as office manager for the defendant at his place of business in Chicago he had control of or responsibility for Mr. Joyce's funds and the drawing of checks; that the defendant had directed him to draw the aforesaid checks, but had not explained to the witness what the checks were for; that on March 4, 1929, the defendant called him to his office and directed him "to write a letter to E. M. Gattle & Company and ask them for a full statement of account and -- Q. You note that this letter speaks of a check for one thousand dollars. A. Yes. He directed me to draw that check at that time and enclose it with the letter. Q. Had you prior to this time had any talks with Mr. Joyce about E. M. Gattle & Company's account with Mrs. Joyce? A. No; only he had previously directed me to draw checks to them but had not explained what the checks were for. Q. Did you know prior to the writing of the letter of March 4, 1929, that the checks were to be payment on the jewelry account? A. No, I did not. Q. This was the first knowledge you had of that fact. A. Yes. Q. That is, on March 4, 1929. A. Yes." In obedience to the directions of the defendant, Gregg sent the following letter, in which was inclosed a check for \$1,000, to the plaintiff:

"March 4th, 1929.

E. M. Gattle & Co.,
703 Fifth Avenue,
New York, New York.

Gentlemen:-

We enclose check for \$1000.00 to apply on account of Mrs. Belle M. Joyce. Will you please send an itemized bill of Mrs. Joyce's account showing

purchases and credits including all payments and showing the dates of same.

Yours truly,
James Stanley Joyce,
By John P. Gregg

JPG:lw
Enclosure"

The witness further testified that a few days later the following statement was received from the plaintiff:

"Statement

New York March 6th, 1929

Mrs. J. Stanley Joyce

To E. M. Gattle & Co. Dr
Platinummiths & Jewelers
703 Fifth Avenue -- St. Regis Hotel

| | | | |
|------|----|-------------------|------------------|
| 1928 | | | |
| Apr | 5 | Bracelet | 49,500.00 |
| | | " | 12,500.00 |
| Oct. | 14 | Re-ensemeling Pin | 13.50 |
| | | Brooch | 6,500.00 |
| | | | <u>28,513.50</u> |

Credit

| | | | |
|-------------|---|---------------|------------------|
| Apr. | 5 | By Bracelet | 4,000.00 |
| Aug. | 8 | " remittance | 2,000.00 |
| Oct. | 4 | " wrist watch | 1,275.00 |
| Dec. | 3 | " remittance | 1,000.00 |
| <u>1929</u> | | | |
| Mar. | 4 | " " | 1,000.00 |
| | | | <u>9,275.00</u> |
| | | | <u>19,238.50</u> |

'By request'

The witness further testified that on June 15 he wrote, in lead pencil, at the bottom of the above statement:

| | | | |
|---------|---|------|------------------|
| "Jun 15 | " | 2500 | <u>2,500.00</u> |
| | | | <u>16,738.50</u> |

that when he received the statement he showed it to Mr. Joyce and that the latter then made no comment in reference to the same; that on June 11, 1929, he sent a further check for \$2,500 to the plaintiff and that on June 15 the following letter was received from the plaintiff:

100-443887-100

12-10-61
12-10-61

The witness further testified that a few days before the following statement was received from the witness:

NEW YORK MARCH 22 1960

TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES
OF THE STATE OF NEW YORK
IN SENATE CHAMBERS, ALBANY, JANUARY 14, 1891.

| | | |
|------|---------|---------|
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| 1911 | 1000.00 | 1000.00 |
| 1912 | 1000.00 | 1000.00 |
| 1913 | 1000.00 | 1000.00 |
| 1914 | 1000.00 | 1000.00 |
| 1915 | 1000.00 | 1000.00 |
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| 1982 | 1000.00 | 1000.00 |
| 1983 | 1000.00 | 1000.00 |
| 1984 | 1000.00 | 1000.00 |
| 1985 | 1000.00 | 1000.00 |
| 1986 | 1000.00 | 1000.00 |
| 1987 | 1000.00 | 1000.00 |
| 1988 | 1000.00 | 1000.00 |
| 1989 | 1000.00 | 1000.00 |
| 1990 | 1000.00 | 1000.00 |
| 1991 | 1000.00 | 1000.00 |
| 1992 | 1000.00 | 1000.00 |
| 1993 | 1000.00 | 1000.00 |
| 1994 | 1000.00 | 1000.00 |

Hypothese 4:

...of the bottom of the same ...

CODE 01 1000

On June 11, 1968, he sent a letter which was received from the
the letter made no comment as to whether or not he had seen
that when he received the document he always is in the habit of

1991-1992

"June 15th, 1929

Mr. J. S. Joyce,
307 N. Michigan Ave.,
Chicago, Ill.

Dear Sir:-

We acknowledge receipt of your check for \$2500.00, which has been credited to your account, with thanks.

Very truly yours,

IA:M"

The witness further testified that when he received this letter he made the aforesaid pencil notation at the bottom of the statement. This statement remained in the possession of the defendant and was produced by him at the trial. The witness further testified to the receipt, by the defendant, of the following additional letters from the plaintiff:

"August 8th 1928

Mrs. J. Stanley Joyce,
1540 Lake Shore Dr.,
Chicago, Ill.

Dear Mrs. Joyce:-

I am in receipt of your kind note of the 6th instant with check for \$2000.00, which has been credited to your account, with thanks, and find enclosed herewith statement.

Agreeable to your request, I hand you herewith description and valuation of the two bracelets, for insurance purposes.

I look forward with pleasurable anticipation to your call, and remain

Very truly yours,

EMG:M

P. S. 1 copy is for your file and the other for the insurance company, we also have a copy."

"December 13th 1928

Mr. J. S. Joyce,
307 N. Michigan Ave.,
Chicago, Ill.

Dear Sir:-

We acknowledge receipt of your check for \$1000.00, which has been credited to your account, with thanks.

IA:M"

Very truly yours,

James H. H. H.

Mr. J. S. Taylor
207 W. Michigan Ave.
Chicago, Ill.

Dear Sir:-
We acknowledge receipt of your check for \$1000.00,
which has been credited to your account, and thank you.

Very truly yours,

W. H. H.

The witness further testified that when he received this letter he
made the enclosed general notation at the bottom of the statement.
This statement remained in the possession of the defendant and was
produced by him at the trial. The witness further testified to the
receipt, by the defendant, of the following additional letters from
the plaintiff:

"Letter No. 1234"

Mr. J. S. Taylor
1848 Lake Shore Dr.
Chicago, Ill.

Dear Mr. Taylor:-
I am in receipt of your kind note of the 12th inst.
with check for \$1000.00, which has been credited to your
account, and thank you very much.

Respectfully as your request, I send you herewith
description and notation of the two checks, for insurance
purpose.

I look forward with pleasant anticipation to your
call and return.

Very truly yours,

W. H. H.

P. S. I copy is for your file and the other for the insurance
company, so also have a copy.

"December 12th 1912"

Mr. J. S. Taylor
207 W. Michigan Ave.
Chicago, Ill.

Dear Sir:-
We acknowledge receipt of your check for \$1000.00,

"March 6th 1929

Mr. James Stanley Joyce,
307 N. Michigan Ave.,
Chicago, Ill.

Dear Sir:-

att. Mr. John P. Gregg

We acknowledge receipt of check for \$1000.00,
which has been credited to Mrs. Joyce's account, with
thanks.

Agreeable to your request of the 4th instant,
we are enclosing herewith itemized statement of the account,
and remain

Very truly yours,

IA:M"

"Aug. 14th 1929

Mr. J. Stanley Joyce,
307 N. Michigan Ave.,
Chicago, Ill.

Dear Sir:-

Our accountants called our attention to your account
showing a balance of \$16738.50.

The last payment of \$2500.00 was received on June 18th.
While we do not wish to appear as urging payment, they contended
that payments should be more frequent or for larger amounts,
considering the fact that the account is a year old.

We would appreciate your letting us know what you can
do about the account, and remain

Very truly yours,

IA:M"

On November 1, 1929, the following letter was sent to the defendant
by Leo Spitz, attorney for the plaintiff:

"November 1st, 1929.

James Stanley Joyce, Esq.,
307 North Michigan Avenue,
Chicago, Ill.

Re: E. M. Gattle & Co.
vs: Joyce

- - - - -

Dear Sir:

Our client E. M. Gattle & Co. of this city has handed
us your account which shows a balance of \$16,738.50 due it.

Before doing anything further in the matter, we trust
that you will send a check and we, therefore, await word from
you accordingly.

Very truly yours,

CL:BT
Reg. Mail"

Chicago, Ill.

Mr. James Hamilton Jones,
307 N. Michigan Ave.,
Chicago, Ill.

Dear Sir:

The enclosed check of \$100.00 is for the amount which has been received from your account.

Very truly yours,
J. H. Jones

Very truly yours,

Mr. J. Hamilton Jones,
307 N. Michigan Ave.,
Chicago, Ill.

Dear Sir:

The enclosed check of \$100.00 is for the amount which has been received from your account.

The last payment of \$100.00 was received on June 15th. This we do not wish to repeat as being payment, but consider that payment should be more frequent or for larger amounts. Please let me know what the amount is a year ago.

I would appreciate your letting me know what you can do about the account, and remain

Very truly yours,

J. H. Jones

On November 1, 1929, the following letter was sent to the defendant

by the plaintiff, attorney for the defendant

"November 1st, 1929.

James Hamilton Jones,
307 N. Michigan Ave.,
Chicago, Ill.

Mr. J. H. Jones & Co.
307 N. Michigan Ave.
Chicago, Ill.

Dear Sir:

Our office is in Chicago & we at this city have received your account which shows a balance of \$100.00 due us.

Below is a copy of the letter in the matter, we trust that you will send a check and we, therefore, shall wait from you accordingly.

Very truly yours,

Thomas McGuire, a member of the McGuire & White Detective Agency, testified that he received the aforesaid letter "from one of the lady clerks in Mr. Joyce's office;" that "I have known Joyce and his brother and knew their father and their grandfather, and I have had more to do with any difficulties they had for a great many years;" that he had talked with the attorneys for the defendant and Mrs. Joyce in reference to their marital troubles and that he sent the following answer to the letter of Lee Spitz:

"Chicago, Nov. 4, 1929.

Messrs. Spitz & Bromberger,
55 Pine St.,
New York City,

Gentlemen:-

Your letter of the 1st inst., to James Stanley Joyce is before me for reply, and in relation thereto I want to say that Mrs. Joyce has sued her husband in Chicago charging him with cruelty. An investigation has been made of two previous marriages by Mrs. Joyce, and on the evidence secured from that investigation Mr. Joyce's lawyers have filed an answer to her bill setting forth that she was not properly divorced from her previous marriages and may not be the lawful wife of Mr. Joyce.

In view of that fact it has been deemed consistent to withhold the payment of any bills contracted by Mrs. Joyce pending a hearing of the matter in court here. The question that effect your bill should be decided here within five or six months, and if you file suit against Mr. Joyce in this jurisdiction you would not get a hearing on your case for at least two years in my judgment, and we feel we will have to do with your claim as we have with other claims, ask you to wait until the case in court here is adjudicated.

I presume that she would not have gotten the credit that she did from your firm if it was not for the fact that she bore Mr. Joyce's name. If that is true then it is my opinion that Mr. Joyce should pay your bill when he can do so without injuring the case referred to above.

Mr. Joyce is represented in New York by the law firm of Campbell & Boland, 9 E. 41st St., and if you should send this letter to Mr. Boland of that firm I am inclined to think that he would concur in the views expressed here. If you have some views that you think I should know about I would be glad to hear from you. I will do all that I can to help you get your matter satisfactorily adjusted, but I cannot say or do anything now that would be prejudicial to my client's welfare when the case comes up for hearing.

Very truly yours,
(Signed) Thomas McGuire."

Thomas McGowan, a member of the Executive & Police Protective Agency, testified that he received the aforesaid letter "from one of the lady clerks in Mr. Joyce's office" that "I have known Joyce and his brother and knew their father and their grandfather, and I have had more to do with my difficulties than I can tell you about" and that he had talked with the attorneys for the defendants and Mr. Joyce in reference to their marital troubles and that he sent the following message to the latter of his office:

"Chicago, Nov. 2, 1933.

Messrs. Swift & Prossberger,
30 Pine St.,
New York City.

Gentlemen:

Your letter of the 1st inst., to James Francis Joyce is before me for reply, and in relation thereto I would like to say that Mrs. Joyce has had her husband in Chicago charged with adultery. An investigation has been made at the previous address of Mrs. Joyce, and the evidence furnished from that investigation by Mr. Joyce's lawyers have been an answer to her bill seeking to have the same set aside. I have been divorced from her previous marriage and may not be the lawful wife of Mr. Joyce.

In view of the fact that I am now a married woman, to discuss the payment of my bills contracted by Mr. Joyce would be a matter of the matter in court here. The question of a hearing of the matter will be decided here within five or six days. I am sure that Mr. Joyce is in this position, and if you like want against Mr. Joyce in this position, you would not get a hearing on your matter of law. Two years in my judgment, and we feel we will have to do with your claim as we have with other claims, and you to this point the same in court here in judgment.

I presume that you would not have heard the story that she did from your side if it was not for the fact that you have Mr. Joyce's name. It does not seem to be in my opinion that Mr. Joyce should pay your bill when he has no claim. Including the same payment is money.

Mr. Joyce is represented in New York by the law firm of Randolph & Belmont, 7 E. 42nd St., and if you desire send this letter to Mr. Belmont of that firm. I am inclined to think that he would prefer in the same manner to have you have your story told to him. I would like to hear from you. I will do all that I can to help you get your matter satisfactorily adjusted, but I cannot say so to you. I am sure that you will be satisfied to my client's welfare and the same up the morning.

The defendant contends that the evidence does not warrant a finding that there was direct authority to buy the jewelry in question. After a careful examination of the evidence bearing upon this contention we have reached the conclusion that it is without merit, and in this connection we may say that the defendant did not testify in the case. The defendant strenuously argues that the fact that the jewelry was charged to Mrs. Joyce conclusively proves that the credit was extended to her. The testimony of Mrs. Joyce and Mr. Gattle bearing upon the two transactions is not rebutted. Schouler, in his work on Marriage, Divorce, Separation and Domestic Relations, 6th Ed., vol. 1, p. 120, says: "The husband is not relieved by the single circumstance that the goods were charged on the shop books to the wife; since prima facie the actual credit is always supposed to be given to the husband." The author cites many cases in support of this statement of the law. In 27 A. L. R. 565, the annotator states: "It appears to be well settled that, while the fact that the seller charges the goods to the wife or renders a bill in her name may be evidence tending to show that he was, in fact, giving credit to her exclusively, and not to the husband, yet this circumstance alone is not conclusive, but may be overcome by other evidence showing that the credit was given to the husband, so as to render him liable." In support of this statement of the law the annotator cites many cases. To cite from a few of the New York cases: In Rosenfeld v. Peck, 149 App. Div. 663, 134 N. Y. Supp. 392, it was held that the fact that the bill for goods sold to the wife was made out to her by the seller is not conclusive that credit was in fact given to her. In Arnold v. Allen, 9 Daly (N. Y.) 123, the court held the plaintiff was properly allowed to explain why the goods were charged on his books to the wife, and not to the husband, and might show that it was his custom to enter upon

The defendant's argument that the evidence does not support a finding that there was direct authority to buy the jewelry is question. After a careful examination of the evidence bearing upon this contention we have reached the conclusion that it is without merit, and in this connection we may say that the defendant did not testify in the case. The defendant strenuously argues that the fact that the jewelry was charged to Mrs. Joyce conclusively proves that the credit was extended to her. The testimony of Mrs. Joyce and Mr. Galtie bearing upon the two transactions is not requested. Defendant, in his work on Marriage, Divorce, Separation and Domestic Relations, 4th Ed., vol. 1, p. 180, says: "The husband is not relieved by the single circumstance that the goods were charged on the shop books to the wife; since prima facie the actual credit is always supposed to be given to the husband." The author cites many cases in support of this statement of his law. In W. A. R. 302, the annotator states: "It appears to be well settled that, while the fact that the seller charges the goods to the wife or transfers a bill in her name may be evidence tending to show that he was, in fact, giving credit to her exclusively, and not to the husband, yet this circumstance alone is not conclusive, but may be overcome by other evidence showing that the credit was given to the husband, so as to render him liable." In support of this statement of the law the annotator cites many cases. To cite from a few of the New York cases: In Robinson v. Bank, 128 App. Div. 823, 128 N. Y. Supp. 302, it was held that the fact that the bill for goods was in the wife's name was not sufficient to show that the credit was in fact given to her. In Smith v. Smith, 9 Misc. (N. Y.) 100, the court held the plaintiff was properly allowed to explain why the goods were charged on his books to the wife, and not

his account books the names of women who dealt with him, but to send the bills for the purchases to their husbands; that the question as to whom credit is given by a tradesman is one of intent, and that he may explain entries in his books, as well as receipts and similar writings, which prima facie contradict his assertions on the subject. In Wichstrom v. Pack, 148 N. Y. S. 596, the court held that in an action against a husband for the price of dresses supplied to his wife, evidence that the account was kept in the wife's name and the bills sent to her, did not show as a matter of law that the credit was given exclusively to the wife, and the question should have been submitted to the jury. In conclusion we may say that it is a matter of common knowledge that storekeepers very frequently charge the article sold, to the wife, whereas in fact the credit is extended to the husband. While the evidence showing payments on account by the defendant does not make out a prima facie case that he authorized the purchase of the jewelry, nevertheless, it is a circumstance to be considered in connection with all the other evidence in the case in determining the defendant's liability. (See Farrington v. Anable, 84 Ill. App. 593, 594.) In the instant case it is admitted that the defendant was a man of very large means and he made no effort to prove that Mrs. Joyce had any means of her own, and under all the facts and circumstances in evidence it would seem highly improbable that the plaintiff extended the credit to her.

The plaintiff contends that "even though there had been no authority in the first instance, Joyce's ratification of the purchase is clearly established." The defendant contends that the finding of the court cannot be justified upon the theory of ratification of the purchase. In our judgment the finding of the court can be sustained upon the theory of ratification.

We deem it necessary to state that the defendant, in his

his account books the names of women who dealt with him, but he
wrote the bill for the purchase to their husbands, and the
as to whom credit is given by a tradesman is one of intent, and that
he may explain entries in his books, as well as receipts and similar
evidence, which John presented his evidence as the subject.
In William v. Pack, 148 N. Y. 2, 1902, the court held that in an
action against a husband for the price of dresses supplied to his
wife, evidence that the account was kept in the wife's name and the
bill sent to her, did not show as a matter of law that the credit was
given exclusively to the wife, and the question should have been sub-
mitted to the jury. In conclusion we may say that it is a matter of
common knowledge that stockholders very frequently charge the entire
cost, to the wife, whereas in fact the stock is entered to the
husband. This was evidence showing payment in account by the
defendant does not make out a prima facie case, but is important
the purchase of the jewelry. Nevertheless, it is a circumstance to
be considered in connection with all the other evidence in the case
in determining the defendant's liability. (See William v. Pack,
148 N. Y. 2, 1902, 1903.) In the instant case it is admitted that
the defendant was a man of very large means and he made no effort to
show that the bills were not paid, and that all the bills
and circumstances in evidence it would seem highly probable that the
plaintiff entered the credit to her.
The plaintiff contends that "even though there had been no
authority in the first instance, Japan's withdrawal of the purchase
is clearly established." The defendant contends that the finding
of the court cannot be justified upon the theory of withdrawal of
the purchase. In our judgment the finding of the court can be
maintained upon the theory of withdrawal.

original brief, has not raised any question as to the admissibility of any evidence offered by the plaintiff, but in his reply brief he states that "The evidence of Mrs. Joyce was not legal evidence. We presume this Court, in considering the case, will also ignore evidence in the record which, under principles of law well known to us all, is evidence that is incompetent, irrelevant and immaterial." Under the settled rules of this court the plaintiff has the right to insist that this argument of the defendant be ignored. We might say, however, that the general rule seems to be that if the wife of a party has acted as the agent of her husband in the business transaction as to which she has testified, she is competent. The following are a few of the Illinois cases that sustain this statement of the law: Donk Bros. Coal Co. v. Streeter, 229 Ill. 134; Robertson v. Brest, 83 Ill. 116; Lumbard v. Heldman, 115 App. 452. The testimony of Mrs. Joyce made out a prima facie case that the defendant made her his agent in the two transactions in question, and the defendant did not see fit to dispute her testimony. Moreover, there are other facts and circumstances in evidence that strongly support her testimony in that regard. In Wigmore on Evidence, 1st Ed., sec. 616, the author says: "A very common exception is that which qualifies husband and wife wherever the transaction in issue was alleged to have been conducted by the wife as agent for the husband, or (sometimes) by either as agent for the other. Under this clause, it seems to be proper enough to hold that the person offered under it may also be the one to prove the agency which thus qualifies the witness. This exception was instituted on the general principle of necessity, and hence, in at least one jurisdiction, it is found developed as an original part of the common law." If it were necessary, a number of cases might be cited in which the agency has been proven by the testimony of the wife. Hitchell v. Hughes, 24 Ill. App. 308, 309, is a case in point.

original belief, has not raised any question as to the admissibility of any evidence offered by the plaintiff, nor in his right belief. He stated that the evidence of Mrs. Taylor was not legal evidence. To prevent this Court, in considering the case, will also have evidence in the record which, under principles of law well known to me, is evidence that is incompetent, irrelevant and immaterial. Under the existing rules of this Court the plaintiff has the right to insist that this argument of the defendant be ignored. He might say, however, that the general rule seems to be that if the wife of a party has acted as the agent of her husband in the business transaction in question she has testified, she is competent. The following is a list of the Illinois cases that contain this statement as the law: People v. Taylor, 100 Ill. 2d 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

(See also Hunk Bros. Coal Co. v. Stroetter, *supra*, p. 137.)

The plaintiff contends that the finding of the trial court can also be sustained upon the ground that the articles of jewelry were necessities suitable to the wealth of the defendant and the position in life of the latter and his wife; the defendant contends to the contrary. We do not deem it necessary to pass upon this disputed question.

The defendant, without protest of any kind, made substantial payments on the account from time to time, and he never indicated to the plaintiff firm that he would not be responsible for the payment of articles that his wife had purchased or might purchase. The last payment on account was made on June 15, 1929. About that time Mrs. Joyce commenced divorce proceedings against the defendant. Thereafter the defendant ceased his payments on the account and it is evident from the letter of McGuire that payments were halted because of the divorce proceedings. The following, from the letter of McGuire, is not without some bearing upon this case: "I presume that she would not have gotten the credit that she did from your firm if it was not for the fact that she bore Mr. Joyce's name. If that is true then it is my opinion that Mr. Joyce should pay your bill when he can do so without injuring the case (the divorce case) referred to above." And the writer further adds that "in view of that fact (the divorce case and the defense made to the same) it has been deemed consistent to withhold the payment of any bills contracted by Mrs. Joyce pending a hearing of the matter in court here." It seems clear from the entire evidence that the failure of the defendant to pay the balance due upon the bill arose from his marital difficulties, but surely the plaintiff firm should not be made to suffer because of that situation.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Kerner, P. J., and Gridley, J., concur.

35762

WILLIAM F. ARNOLD,
Appellant,

v.

T. A. JONES et al.,
Appellees.

147
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

267 I.A. 623

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

William F. Arnold, plaintiff, sued T. A. Jones and W. F. Smith, defendants, in the Municipal court of Chicago in a tort action. There was a trial before the court, without a jury. It appears from the bill of exceptions that at the conclusion of the plaintiff's evidence the case was dismissed by agreement as to the defendant Smith, although the common law record does not show that an order to that effect was entered. However, the failure to enter the order is of no consequence. At the conclusion of all the evidence the court found "the defendants" not guilty. Judgment was entered upon the finding and this appeal followed.

Plaintiff's statement of claim alleges that on "October 6, 1930, while the plaintiff with all due care was driving his automobile along what is known as the Outer Drive in the City of Chicago in a northerly direction, the defendants W. F. Smith and T. A. Jones through their several agents so carelessly and negligently managed and drove their respective automobiles that the automobiles of the said W. F. Smith and T. A. Jones struck the automobile of the plaintiff with great force and violence, damaging the automobile of the plaintiff to the amount of \$439.79 and at the same time injuring the left arm and left knee, stomach and left hip of the plaintiff to the damage of the plaintiff of \$1,000." Each

WILLIAM F. ARNOLD,
Appellant.

v.

T. A. JONES et al.,
Appellees.

287 I.A. 683

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

William F. Arnold, plaintiff, sued T. A. Jones and
T. A. Smith, defendants, in the Municipal Court of Chicago in a
last action. There was a trial before the court, which in July,
1930, rendered a judgment in favor of the plaintiff. It
appears from the bill of exceptions that at the conclusion of
the plaintiff's evidence the case was dismissed by agreement as
to the defendant Smith. Although the common law record does not
show that an order so that effect was entered. However, the
failure to enter the order is of no consequence. At the conclusion
of all the evidence the court found "the defendants" not guilty.
Judgment was entered upon the finding and this appeal followed.
The plaintiff's statement of claim alleges that on "October
1, 1930, while the plaintiff with his wife was driving his
automobile along what is known as the Outer Drive in the City of
Chicago in a northerly direction, the defendant T. A. Smith and
T. A. Jones, through their counsel, agents or servants and knowingly
managed and drove their respective automobiles into the automobile
of the plaintiff T. A. Smith and T. A. Jones against the negligence of the
plaintiff with great force and violence, causing the automobile
of the plaintiff to be damaged to the amount of \$439.75 and at the same time

defendant filed an affidavit of merits. Plaintiff states that "no point is raised on the pleadings."

Plaintiff thus states his theory of fact: "The plaintiff's case is that in the late afternoon of October 6, 1930, the plaintiff was driving his automobile in a northerly direction on the public street or highway in the City of Chicago known as the Outer Drive in the vicinity of Forty-sixth Street; that he was driving in a careful manner at a moderate rate of speed, about twenty-five miles an hour, maintaining that north-bound lane of traffic nearest the center of the highway; that the defendant Jones' car was, at that time, being driven by Jones' wife, the agent of Jones, in the same direction in a parallel lane of traffic to the right of the plaintiff; that when the plaintiff's automobile was abreast of that of the defendant, Jones, in passing, the latter was driven so negligently that it swerved to the left striking plaintiff's automobile, knocking off the right front hub cap of plaintiff's automobile and pushing the car to the left into the south-bound traffic so that it was struck by an oncoming Pierce-Arrow (that of the other defendant, T. E. Smith.)" The accident occurred on October 6, 1930, on the Outer Drive in Chicago, somewhere between 46th and 48th streets. While the plaintiff states the accident happened about 5 p. m., one of his witnesses and also the witnesses for the defendant fix the time of the accident "about 5:30 p. m." The plaintiff testified that "the weather was slightly misty and the street was somewhat slippery." Malcolm Stewart, a witness for the plaintiff, testified: "It was not dark by any means and it was not particularly light. It was sort of a murky afternoon, around 5:00 o'clock. To my recollection no one at that time was using lights." One of the witnesses for the defendant testified that "the weather was rainy and very dark. The vehicles were all lighted," while another

Defendant filed an affidavit of service. Plaintiff states that "no point is raised on the pleadings."

Plaintiff then states his theory of facts: "The plaintiff's

case is that in the late afternoon of October 22, 1935, the plaintiff was driving his automobile in a northerly direction on the public street or highway in the City of Chicago known as the Outer Drive in the vicinity of Forty-sixth Street; that he was driving in a usual and proper manner at a moderate rate of speed, about twenty-five miles an hour, maintaining the north-bound lane of traffic across the center of the highway; that the defendant James, at that time, being driven by Jones, also the owner of James, in the same direction in a northerly lane of traffic to the right of the plaintiff; that when the plaintiff's automobile was abreast of him at the defendant's

James, in passing, the latter was driven so negligently that it turned to the left striking plaintiff's automobile, causing all the right hand end of plaintiff's automobile and pushing the car to the left into the south-bound traffic so that it was struck by an oncoming vehicle - that of the other testimony."

Plaintiff states the facts as follows: "The accident occurred on October 22, 1935, on the Outer Drive in Chicago, approximately between 40th and 48th Streets. The plaintiff stopped the car at the intersection about 2 P.M., and at that time he saw the defendant's car approaching from the north. The defendant was also the witness for the defendant for the time of the accident 'about 2 P.M.' The plaintiff testified that 'the witness was slightly ahead and the speed was somewhat slight.' Plaintiff himself, a witness for the plaintiff."

Plaintiff then says that he was not negligent. It was not at a party, afternoon, around 3:00 P.M. In my recollection no one at that time was using lights. The witness for the defendant testified that 'the witness was

witness for the defendant testified that "it was a dark, very foggy night, very foggy and very misty," and still another witness for the defendant testified: "It was a dark afternoon and had been misting late in the afternoon and was a drizzly rain at 5:30. The automobile traffic all had their lights on. My vehicle had its lights on. I turned the lights on the car before I left the garage." The testimony for the defendant Jones was to the effect that his car did not touch the plaintiff's car at all and that the collision between the cars of the plaintiff and the defendant Smith was due entirely to the carelessness of the plaintiff. Several witnesses for the defendant testified that the car of the plaintiff, just before and at the time of the accident, was going about forty-five miles an hour. There were four lanes of traffic south-bound and two or three lanes north-bound. The traffic was heavy. The plaintiff stated that just as he was about to pass the car of the defendant Jones the latter suddenly turned his car and struck the right front hub cap of plaintiff's car, turned it around and threw it into the path of the car of the defendant Smith, which was traveling south and which struck plaintiff's car head-on. The plaintiff testified that at the time in question he was going about twenty-five miles an hour and that he did not recall whether he had given any notice of his intention to pass the car of the defendant Jones; that when he intended to pass other cars that evening he did not always blow his horn. Later in his testimony he stated that he was morally certain that he did use his horn in passing the car of the defendant Jones.

At the conclusion of the evidence the trial court found the defendants not guilty. The counsel for the plaintiff then insisted that if the trial court would allow him a further opportunity to discuss the evidence he could convince the court that his finding

...the defendant testified that it was a dark, very
very night, very foggy and very misty, and still another witness
for the defendant testified: "It was a dark afternoon and had
been raining hard in the afternoon and was a drizzly rain at 5:30.
The defendant testified all these things were by the defendant
the lights on. I turned the lights on the car before I left the
garage." The testimony for the defendant Jones was to the effect
that his car did not touch the plaintiff's car at all and that the
collision between the cars of the plaintiff and the defendant might
was due entirely to the carelessness of the plaintiff. However
witnesses for the defendant testified that the car of the plaintiff
lost control and at the time of the collision, was under great strain
five miles an hour. There were four lanes of traffic south-bound
and two or three lanes north-bound. The traffic was heavy. The
plaintiff stated that just as he was about to pass the car of the
defendant Jones the latter suddenly turned his car and struck the
right front end of plaintiff's car, turned it around and threw
it into the back of the car of the defendant Jones, which was
traveling north and which struck plaintiff's car head-on. The
plaintiff testified that at the time in question he was going about
twenty-five miles an hour and that he did not recall whether he had
given any notice of his intention to pass the car of the defendant
Jones; that when he intended to pass other cars that evening he
did not always blow his horn. Later in his testimony he stated
that he was usually certain that he did not have to passing the
car of the defendant Jones.
As the conclusion of the evidence the trial court found
the defendant not guilty. The counsel for the plaintiff then
insisted that if the trial court would allow him a further opportunity

was not justified by the facts. The trial court granted the request of the counsel, but, after hearing further argument, adhered to his finding.

The plaintiff contends that "there was no competent or credible evidence introduced to make out a defense to the plaintiff's *prima facie* case. A finding should have been made and judgment entered thereon for the plaintiff." We have carefully read the entire bill of exceptions and are satisfied that there is no merit in this contention and that the trial court was fully justified, under all the evidence, in finding for the defendants.

The plaintiff further contends that the trial court erred in refusing two of the propositions of law submitted by the plaintiff. There is not the slightest merit in this contention.

The bill of exceptions shows that the trial court was fair and patient in his conduct of the trial. The judgment of the Municipal court of Chicago should be and it is affirmed.

AFFIRMED.

Kerner, P. J., and Gridley, J., concur.

was not justified by the facts. The trial court granted the
 request of the defendant, but without further argument.

objected to his reading.

The plaintiff contends that "there was no competent

or credible evidence introduced to make out a defense to the

plaintiff's claim for damages. A finding should have been made

and judgment entered thereon for the plaintiff." We have carefully

read the entire bill of exceptions and the evidence that there is

no merit in this contention and that the trial court was fully

justified in finding all the evidence, in finding for the defendant.

The plaintiff further contends that the trial court erred

in refusing two of the propositions of law submitted by the plain-

tiff. There is not the slightest merit in this contention.

The bill of exceptions shows that the trial court was

fair and patient in his conduct at the trial. The judgment of

the municipal court of Chicago should be and is affirmed.

APPEAL.

Lawson, H. L., and Bridgely, J., concur.

35231

MICHAEL DEBDO,
Defendant in Error,

v.

LAKE VIEW STATE BANK, a
Corp., HARRY BROUNSTEIN
and ETHEL BROUNSTEIN,
Plaintiffs in Error.

148 7
ERROR TO CIRCUIT

COURT, COOK COUNTY.

267 I.A. 624¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The complainant filed a bill to foreclose a junior mortgage upon certain property in the city of Chicago. The case was referred to a master, who found that the complainant was entitled to a foreclosure of the trust deed in question and a sale of the premises. From a decree entered in conformance with the recommendations of the master, the defendants (plaintiffs in error) have sued out this writ of error.

The bill alleges that the defendant, Lake View State Bank, a corporation, not personally, but as trustee under the provisions of a deed of trust, executed and delivered 36 promissory notes, 35 for \$150 each and one for \$1,350, "one note being due on the 15th day of each and every month beginning on January 15th, 1930, and for 35 months thereafter, and the last due on Dec. 15, 1932, each and all of said notes bearing interest at 6 per cent per annum;" that on the reverse side of each of the notes appears the following: "For value received, we hereby guarantee the payment of this note and all expense of collecting the same, including attorney's fees, and waive protest and notice of non-payment and diligence in collecting the same, and consent that security may be taken or the time of payment be extended without impairing this guarantee. (Signed)

^aSource: U.S. Census Bureau.

1

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relating to the conduct of the trial and the conduct of the jury.

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was reported to a number of persons that the confidential was

and evidence in each case is in support of a finding

also at the University of Illinois at Urbana-Champaign.

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amely hogy az államnak az a kötelessége, hogy a világhoz viszonyítottan a lehető legmagasabb szintű jóléti állapotot érje el.

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for \$100 each and the lot \$1,000, "one more being due on the 15th

Let us now consider the case where $\alpha = 0$. In this case, the system (1) becomes:

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THE RESEARCHERS ARE NOT SURE IF THE RESULTS WILL BE THE SAME FOR ALL TYPES OF CRYSTALS.

NOTHING IS KNOWN OF THE RESULTS OF THE INVESTIGATION.

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Harry Brounstein Esther Brounstein." The bill further alleges that to secure the payment of the notes the Bank, as trustee, executed and delivered its trust deed in the nature of a mortgage, ~~to~~ conveying to the Chicago Title & Trust Company, as trustee, the property in question. The bill further alleges that all sums due the complainant "are subject only to the lien of a trust deed for \$35,000.00 to the Chicago Title & Trust Co., as Trustee." In the answers of the defendants Harry Brounstein and Esther Brounstein they admit the execution of the trust deed in question and that they signed the guaranty upon each of the notes, "but they say at the time complainant declared the notes due and began this foreclosure proceeding, he had in his possession more than enough money belonging to these defendants to pay the installments claimed to be due, and there was, therefore, no default, and the complainant, at the time of the filing of the bill was indebted to these defendants, and not entitled to file the bill; * * * that at the time of filing the bill complainant owed defendants \$600 which he retained out of the \$6000 claimed to have been loaned these defendants. That he only loaned them the sum of \$6000, and charged an usurious charge of \$600 as a commission for loaning his own money. That he was indebted to them in the further sum of \$700 as part of the purchase price of other property to which they had given him a deed which he failed and neglected to pay these defendants, and that at the time of the filing of the bill of complaint the complainant was indebted to Harry Brounstein in the further sum of \$1200 for services which he, Brounstein had rendered for the complainant and which complainant had refused and neglected to pay."

The master found, inter alia, that on October 24, 1926, the defendant Lake View State Bank, a corporation, as trustee under the provisions of a trust agreement dated March 14, 1927, and known as Trust No. 108, negotiated for a loan with the complainant

herein in the sum of \$6600, said loan to be secured by a junior mortgage on the premises in question; that the Bank made, executed and delivered its 36 principal promissory notes, all bearing date October 24, 1929, numbered from 1 to 36, both inclusive, made payable to the order of bearer, notes numbered 1 to 35, both inclusive, being for \$150 each and note No. 36 being for the sum of \$1350; note No. 1 being due and payable on or before the 15th day of January, 1930, and one of said notes numbered 2 to 36, both inclusive, being due and payable on or before the 15th day of each and every month thereafter, in their numerical, consecutive order, all of said notes bearing interest until maturity at the rate of six per cent per annum, payable monthly on the balances of principal remaining from time to time unpaid, and bearing interest after maturity at the highest rate for which it was then lawful to contract. "Third: The Master further finds that each of the principal notes aforesaid bears the following notations on the face thereof: 'This note is secured by a junior mortgage,' and 'This is one of the principal notes described in the within mentioned trust deed. No. 57480, Chicago Title and Trust Company, Trustee'; that each of said notes also bears a guarantee, on the reverse side thereof, which is in words and figures as follows: 'For value received, we hereby guarantee the payment of this note and all expenses of collecting the same, including attorneys' fees, and waive protest and notice of non-payment and diligence in collecting the same, and consent that security may be taken at the time of payment may be extended without impairing this guarantee.' (Signed) Harry Brounstein (Signed) Esther Brounstein." The master further found that for the purpose of further securing the payment of the principal indebtedness and the interest thereon the Bank executed and delivered its certain indenture, in the nature of a trust deed,

herein in the sum of \$2000, said loan to be secured by a Junior
mortgage on the premises in question; that the Bank made, executed
and delivered the said principal promissory notes, all bearing date
October 24, 1922, numbered from 1 to 32, each inclusive, made payable
to the order of Henry, notes numbered 1 to 32, each inclusive, being
for \$100 each and note No. 32 being for the sum of \$1500; note No. 1
being due and payable on or before the 15th day of January, 1923, and
one of said notes numbered 1 to 32, each inclusive, being due and
payable on or before the 15th day of each and every month thereafter,
in their unexpired, consecutive order, all of said notes bearing
interest until maturity at the rate of six per cent per annum, payable
monthly on the business of principal remaining then due in time
principal, and bearing interest after maturity at the highest rate for
which it was then lawful to contract. That the Bank has
made due and of the principal notes aforesaid made the following
notation on the face thereof: "This note is secured by a Junior
mortgage," and "This is one of the principal notes described in the
within mentioned trust deed No. 1234, Chicago Title and Trust
Company, Trustee;" that each of said notes also bears a numbered
on the reverse side thereof, which is in words and figures as follows:
"Not value received, we hereby acknowledge the payment of this note
and all expenses of collecting the same, including attorney's fees,
and waive protest and notice of non-payment and assignment in whole
for the same, and consent that security may be taken at the time of
payment may be obtained without impairing said security." (Signed)
Harry Brownstein (Signed) Robert Brownstein. The master further
found that for the purpose of insuring the payment of the
principal indebtedness and the interest thereon the Bank executed and
delivered the several mortgages, in the sum of a first mortgage

bearing date October 24, 1929, conveying and warranting to the Chicago Title and Trust Company, a corporation, as trustee, the premises in question. The master further found that the complainant was, at the time of the filing of the bill, "and is now, the legal holder and owner of all of the principal notes hereinabove described, and of the trust deed securing the same." The master further found that notes numbered 1 to 4, both inclusive, matured on the 15th days of January, February, March and April, 1930; that on said dates there also became due the monthly installment of interest on the principal note then maturing, together with the monthly installment of interest on the principal notes then remaining unpaid; that the Bank and the Brunsteins defaulted in the payment of the said principal and interest and that the default still continues. The master further found:

"Sixteenth: The Master further finds that while the principal notes hereinabove described (of which the complainant herein is the legal holder and owner, as aforesaid) aggregate the sum of \$6,600, the proofs in this cause show that the complainant herein did not pay out the full sum of \$6,600 to the defendant Lake View State Bank, a corporation, as Trustee, etc.; that said complainant deducted therefrom the sum of \$600 as and for commissions for the making of said loan, which sum of \$600 was, in fact, a charge for the use of the money in addition to the interest charge of six per cent per annum, provided for in said notes and in the trust deed securing the same. Sixteenth: The Master further finds that said sum of \$600 was usuriously obtained by the complainant from the defendant Lake View State Bank, a corporation, as Trustee, and was retained by said complainant; that by reason thereof, the amount of money due to the complainant under his principal notes and trust deed, should be reduced in the amount of \$600; that in addition thereto, no interest hereafter accruing or becoming due, should be allowed to said complainant on his principal

On the 1st of October 1900, conveying and was sent to the Chicago Title and Trust Company, a corporation, as trustee, the mortgage in question. The master further found that the complainant was, at the time of the filing of the bill, "and is now, the legal holder and owner of all of the principal notes heretofore described, and of the trust deed securing the same." The master further found that notes numbered 1 to 4, both inclusive, matured on the 15th day of January, February, March and April, 1900; that on said dates there was no payment of interest on the principal notes numbered 1 to 4, both inclusive, together with the unpaid balance of interest on the principal notes then remaining unpaid; that the bank and the respondent defaulted in the payment of the said principal and interest and that the default still continues. The master further found: "That the master further finds that the principal notes heretofore described (at which the complainant herein is the legal holder and owner, as aforesaid) aggregate the sum of \$4,000, the proceeds in this case show that the complainant herein did not pay the full sum of \$4,000 to the defendant Lake View State Bank, a corporation, as trustee, etc.; that said complainant collected interest on the sum of \$400 as and for commission for the making of said loan, which sum of \$400 was, in fact, a charge for the use of the money in addition to the interest charge of six per cent per annum, provided for in said notes and in the trust deed securing the same. That

The master further finds that said sum of \$400 was lawfully obtained by the complainant from the defendant Lake View State Bank, a corporation, as trustee, and was retained by said complainant; that by reason thereof, the amount of money due to the complainant hereby due principal notes and trust deed, should be reduced to the amount of

notes, and that the amount now due to said complainant should be reduced to the extent of any and all interest heretofore paid by the defendant to the complainant on account of said notes; that all of said deductions should be made because of the usurious rate of interest charged by said complainant to the defendant, in connection with the aforesaid loan."

The major contention of the defendants Harry Brounstein and Esther Brounstein is that they "were the owners of the real estate sought to be foreclosed, and transferred the title thereto to the Lake View State Bank, in Trust, but retained possession of their homestead, and were living therein at the time of the making of the trust deed herein, and did not release or waive their homestead, and there is no release of homestead in the Trust Deed being foreclosed. * * * Yet the Court, in its decree fails to set off any homestead, but decreed the sale of the whole of the premises, including the homestead of defendants." By reference to the bill it will be found that it does not contain any allegation with respect to a homestead or claim of homestead in the premises. In order to avail of the benefit of the Homestead law, it is incumbent on a defendant, in a suit to foreclose a mortgage, to allege, in his answer, such facts as certainly bring him within the protection of the law. (Lymonds v. Lapping, 82 Ill. 213.) It has also been held that to entitle a defendant in a partition suit to an allowance of homestead in the premises in controversy, the facts relied upon as establishing his homestead right must be averred in his answer. (See Angelo v. Aldridge, 164 Ill. 338.) Where the bill contains no allegation in regard to a right of homestead and the answer of the defendant sets up no fact or facts showing the existence of a homestead at the time of the execution of a mortgage, the right of the defendant to a homestead in the premises, if he had any, was not put in issue by the

notes, and that the money now due to said complainant should be
returned to the extent of say and all interest hereof by
the defendant to the complainant on account of said notes; that all
of said deductions should be made because of the numerous rate of
interest charged by said complainant on the notes; in connection
with the following item:

The major contention of the defendant Harry Brownstein
and Esther Brownstein is that they "were the owners of the real estate
ought to be foreclosed, and transferred the title thereto to the
Lake View State Bank, in Trust, but retained possession of their home-
stead, and were living therein at the time of the making of the trust
deed herein, and did not release or waive their homestead, and there-
fore is no release of homestead in the trust deed being foreclosed." " " "
Yet the Court, in its decision fails to set off any homestead, but
foreclosed the sale of the whole of the premises, including the home-
stead of defendant." By reference to the bill it will be found
that it does not contain any allegation with respect to a homestead
or claim of homestead in the premises. In order to avail of the
benefit of the Homestead Law, it is incumbent on a defendant, in
a suit to foreclose a mortgage, to allege, in his answer, some facts
as certifying that he claims the protection of the law. (People v.
Larkin, 117, 122.) It has also been held by the court

defendant in a petition and to an allowance of homestead in the
premises in controversy, the facts relied upon as establishing his
homestead right must be stated in his answer. (People v. Larkin, 117, 122.)
Hence the bill contains no allegation in
regard to a right of homestead and the answer of the defendant sets
up no facts or facts which would establish the existence of a homestead at the time
of the execution of a mortgage, the right of the defendant to a home-

pleadings. (See Labor v. Mitchell, 92 Ill. 480.) The master, in his report, made absolutely no reference with respect to a homestead or claim of homestead in the premises, and the defendants, in their objections to the master's report, made no objection that had any bearing upon the question of a homestead. Under the record in this case the defendants are in no position to raise the instant contention. Whether or not the defendants can raise the question of homestead should ejectment proceedings be brought against them is not before us for determination.

It would appear from the record that no order was entered permitting objections to the master's report to stand as exceptions, and the complainant, citing Marble v. Thomas, 178 Ill. 340, wherein it was held that confirmation of the master's report is conclusive of matters of fact on appeal where no exceptions to the report are filed after the master has overruled the objections thereto, strenuously argues that for the said failure alone the defendants are in no position to raise the instant contention. We do not deem it necessary to consider this point made by the complainant.

We have carefully considered several minor contentions raised by the defendants and find them to be without substantial merit.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

Kenner, P. J., and Gridley, J., concur.

... ..

in his report, made available in reference to page 20 &

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As these objectives are the mission's primary goals, they are the most important and should be the focus of the mission's planning and execution.

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

deducted and added to the balance on the one side and the other side.

On Monday, July 10, 1967, the following information was received from the [redacted] office:

1. The first of these is the fact that the

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

... ..

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only suggest that the following should be considered:

to be included in the current investment. It is not

and it necessary to consider this point when the investigation is

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1. The first section of the report is the title page, which includes the title of the report, the author's name, and the date of completion.

Source: *Journal of the American Statistical Association*, 91(434), 1039-1052.

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35840

JULIUS E. LACKNER,
Defendant in Error,

v.

MARTIN M. GROSS,
Plaintiff in Error.

1497
ERROR TO MUNICIPAL
COURT OF CHICAGO.

267 I.A. 624

MR. JUSTICE SCAMLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, a physician, sued the defendant to recover for medical services alleged to have been rendered to the wife of the defendant. A jury found the issues for the plaintiff and assessed his damages at the sum of \$433. Judgment was entered upon the verdict and the defendant has sued out this writ of error.

The defendant contends that the recovery cannot be sustained under any express contract with the plaintiff. It is sufficient to say, in answer to this contention, that the liability does not arise from a promise, express or implied, nor does it rest upon contract obligation, but upon a statutory duty imposed by the law of this state upon those occupying the relation of husband and wife. "Under the statute in this State, Cahill's St. ch. 68, par. 15, expenses of the family are chargeable against the property of either husband or wife. It has been held in this State that medical services rendered a member of a family were a family expense and chargeable against the property of either the husband or the wife. Cole v. Bentley, 26 Ill. App. 260; Talcott v. Hoffman, 30 Ill. App. 77." (Leininger v. Thoma, 255 Ill. App. 8, 10.) A number of other cases to the same effect might be cited.

WILLIAM M. JACKSON,
Defendant in Error,

Plaintiff in Error.

ORDER BY COURT.

1901 A.D.

MARTIN E. BRADY,
Defendant in Error.

MR. JUSTICE WILLIAM JACKSON AND JUSTICE OF THE COURT.

The Plaintiff, a physician, and the Defendant in Error, for medical services alleged to have been rendered to the wife of the defendant. A jury found the husband for the Plaintiff and assessed his damages at the sum of \$500. Judgment was entered upon the verdict and the defendant has now and this wife of error.

The defendant contends that the recovery should be reversed under the contract entered into with the Plaintiff. It is sufficient to say, in answer to this contention, that the liability does not arise from a promise, express or implied, but that it rests upon contract obligation, and upon a liability duly imposed by the law of this state upon those occupying the relation of husband and wife. "Under the statute in this state, which is 22, ch. 10, sec. 10, the husband is liable for the negligence against the property of either husband or wife. It has been held in this state that medical services rendered a member of a family were a family expense and negligence against the property of either the husband or the wife. Wells v. Wells, 20 Ill. App. 2d 501; Wells v. Wells, 20 Ill. App. 2d 501; Wells v. Wells, 20 Ill. App. 2d 501. A number of other cases to the same effect might be cited.

The defendant further contends that "the statutory obligation for family expenses does not imply an obligation for needless and unprofitable expenses," and argues, in support of this contention, that the plaintiff ran up "a large bill for treatments of a subnormal woman, which treatments were not in fact helpful." It is sufficient to say, in answer to this contention, that the mere fact that the services were not helpful would not prevent the plaintiff making a fair and reasonable charge for his services. The defendant also contends that the plaintiff did not "inform the husband of the facts," in reference to the alleged treatments. Under the statute the husband is liable for medical expenses incurred by the wife even without his knowledge, consent or acquiescence, provided they were incurred while the family relationship was in existence. (See Carson Pirie Scott & Co. v. Stanwood, 228 Ill. App. 281, 284.) We may add that there is much force in the contention of the plaintiff that under all the facts of the case it is difficult to believe that the defendant, who knew of four operations performed by the plaintiff upon the wife of defendant, was ignorant of the fact that between the operations the wife was receiving medical attention from the plaintiff.

The defendant contends that in any event the plaintiff should not have been allowed a greater sum than \$182, that a "judgment for any sum exceeding \$182 is manifestly against the weight of the evidence." This contention is a meritorious one. The statement of claim alleges that the claim is for professional services rendered Mrs. Gross "during the period from August 27, 1926 to March 2, 1928, which claim is in the amount of \$433." On July 12, 1928, the plaintiff sent to the defendant the following letter:

"July 12th, 1928

Mr. M. M. Gross,
139 North Clark St.,
Chicago.

Dear Mr. Gross:

I will be glad to settle this account for \$125.00 cash if it is paid within the next week or ten days, otherwise the total of \$132.00, according to the itemized statement that I sent to you, must be paid.

Sincerely yours,
Julius E. Lackner."

About the same time the plaintiff sent to the defendant "an itemized statement of Mrs. Gross' account," which shows a balance due of \$132. The statement also shows that the defendant had paid, on account of services, \$432. It would appear from the record that after the defendant had refused to pay the "statement" tendered him in July, 1928, the plaintiff raised the charge for the treatments he had given Mrs. Gross. The plaintiff's answer to the instant contention of the defendant is that the defendant did not offer to pay the plaintiff the sum of \$132 during the trial, but on the contrary "contested the plaintiff's case to the whole of plaintiff's demand," and "has put the plaintiff to the expense, delay and vexation incident to the suit," and that therefore "at this late date it comes with poor grace from the defendant to now insist that plaintiff's recovery should be limited to the said sum of \$132." By this argument the plaintiff, in effect, concedes that the instant contention is a meritorious one. In addition, we may say that it would seem, from all the evidence, that the defendant contested the entire claim in good faith.

If within ten days plaintiff files in this court a remittitur of \$251, the judgment of the Municipal Court of Chicago will be affirmed in the sum of \$132, otherwise the judgment will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

Kerner, P. J., and Gridley, J., concur.

July 1931, 1931

Mr. H. H. Gross
118 North Clark St.
Chicago

Dear Mr. Gross:
I will be glad to make this account for
\$100.00 cash if it is paid within the next week or ten
days, otherwise the total of \$100.00, according to the
attached statement that I sent to you, must be paid.

Sincerely yours,
Julius E. Rosenberg.

About the same time the plaintiff sent to the defendant "an itemized
statement of Mrs. Gross' account," which shows a balance due of \$100.
The statement also shows that the defendant had paid, on account of
this account, \$40.00. It would appear from the facts that after the
defendant had refused to pay the "statement" submitted to him in July,
1930, the plaintiff raised the charge for the statement he had
given Mrs. Gross. The plaintiff's answer in his second statement
of the defendant is that the defendant did not offer to pay the
plaintiff the sum of \$100 during the trial, but on the contrary
"contested the plaintiff's case to the whole of plaintiff's demand."
and "has put the plaintiff to the expense, delay and vexation
incident to the suit," and that therefore "it is his duty to
bring this case from the defendant as was asked that plaintiff
should be limited to the sum of \$100." By
this argument the plaintiff, in effect, contends that the defendant
contested in a malicious way. In addition, we say that it
would seem, from all the evidence, that the defendant contested
the entire claim in good faith.

It is within ten days plaintiff files in this court a
petition of 1931, the judgment of the United States Court of Chicago
will be affirmed in the sum of \$100, otherwise the judgment will be

reversed and the cause remanded.

RECEIVED BY MAIL
JULY 1931, 1931

35915

McKENZIE MORTAR COMPANY,
a corporation,
Appellee.

v.

LAWRENCE NATALI et al.,
Defendants.

LAWRENCE NATALI and AMELIA
NATALI,
Appellants.

150 7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 624³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action brought by the McKenzie Mortar Company, a corporation, plaintiff, against Lawrence Natali, Amelia Natali and E. Smalinsky, defendants. The plaintiff claims a statutory subcontractor's lien against the premises at 126 South Western avenue, Chicago, owned jointly by Lawrence Natali and Amelia Natali, by virtue of a subcontract between itself and E. Smalinsky, who had a general contract with Lawrence Natali for the remodeling of the premises. The case was tried by the court and there was a finding that the plaintiff recover from the three defendants the sum of \$216.57 with interest and costs, and to have a mechanic's lien against the premises. The defendants Lawrence Natali and Amelia Natali have appealed from the judgment entered upon the finding.

The plaintiff's statement of claim alleges that it entered into a contract with Smalinsky to furnish mortar for the said premises at a price of \$3.75 per ton; that it delivered at the premises in question 57.75 tons of mortar at the price of \$3.75 per ton, to the value of \$216.57; that the last delivery occurred

20000

WILLIAM W. WILSON, JR.
Plaintiff

v.

WILLIAM W. WILSON, JR.
Defendant

WILLIAM W. WILSON, JR.
Plaintiff

MR. JUSTICE BRADLEY DELIVERED THE OPINION OF THE COURT.

This is an action brought by the defendant against the plaintiff for the recovery of a certain sum of money. The plaintiff claims that he is entitled to the recovery of the same. The defendant claims that he is not entitled to the recovery of the same. The court finds in favor of the plaintiff and awards him the sum of \$100.00 with interest thereon from the date of the filing of the complaint until the date of the judgment. The court also awards the plaintiff his costs of suit. The judgment is entered accordingly.

WILLIAM W. WILSON, JR.

WILLIAM W. WILSON, JR.

The plaintiff's statement of claim alleges that he is entitled to the recovery of the sum of \$100.00 with interest thereon from the date of the filing of the complaint until the date of the judgment. The court finds in favor of the plaintiff and awards him the sum of \$100.00 with interest thereon from the date of the filing of the complaint until the date of the judgment. The court also awards the plaintiff his costs of suit. The judgment is entered accordingly.

on October 21, 1930, and that a notice of mechanic's lien was served upon the owners on November 1, 1930. The appellants, in their affidavit of merits, deny that materials were furnished in the amount of \$216.57; deny that they had been served with a notice of lien, as required by the statute, and allege that at the time the notice was served they were not indebted to the general contractor but had paid him in full.

The appellants have assigned a number of "points," which state correct abstract propositions of law, but we are unable to see how they apply to the facts of the case, as found by the trial court.

In answer to the appellants' first contention, that "proof of delivery of materials at place of construction held not to preclude showing that materials delivered were not used in building," it is sufficient to say that the trial court was fully justified from the evidence in finding that the plaintiff delivered to the building in question the materials alleged in the statement of claim. It is true that the defendant Lawrence Natali testified that "not all of the material went into my building. They took some next door," but this evidence was rebutted by the testimony of H. A. Kincaid, who denied that any of the material was delivered next door, and we are satisfied from a careful study of the evidence that the trial court was fully justified in believing the testimony of Kincaid. Natali merely testified that not all of the material went into his building and he did not pretend to state the amount that did not go into his building.

The appellants contend that the evidence does not show that personal service was had upon them or their agent, as required by the statute. We have examined the evidence bearing upon this contention and we are satisfied that the contention is without the

on October 21, 1930, and that a notice of motion was served upon the court on November 1, 1930. The appellants, in their affidavits of motion, deny that materials were furnished in the amount of \$125.00; deny that they had been served with a notice of motion, as required by the statute, and allege that at the time the notice was served they were not indebted to the general contractor but had paid him in full.

The appellants have assigned a number of "points." These points concern abstract propositions of law, but so far as they apply to the facts of the case, as found by the trial court.

In answer to the appellants' first contention, that "proof of delivery of materials is given at construction site and is prima facie evidence that materials delivered were not also delivered elsewhere," it is submitted to say that the trial court was fully justified in its finding in finding that the materials delivered to the building in question was material alleged in the statement of claim. It is also stated that the materials delivered to the building were not delivered elsewhere and were used by the building. They were used for the building, and were not delivered elsewhere by the contractor. It is also stated that the materials were delivered to the building, and were not delivered elsewhere by the contractor. They were used for the building, and were not delivered elsewhere by the contractor. It is also stated that the materials were delivered to the building, and were not delivered elsewhere by the contractor. They were used for the building, and were not delivered elsewhere by the contractor.

The appellants contend that the evidence is such that the general contractor was not liable for the materials, and that the materials were not delivered to the building.

slightest merit.

The appellants next contend that the plaintiff failed to prove the value of the materials furnished, as required by the statute. There is no merit in this contention. The plaintiff's statement of claim alleges that mortar to the value of \$216.57 was delivered to the premises. This is not denied in the affidavit of merits of the appellants, and therefore, under Rule 18, sec. (k), of the Municipal court, it stands admitted. The appellants made no effort to prove that the mortar was not of the value alleged in the statement of claim, and, indeed, as the plaintiff claims, they would have been precluded from so doing because they failed to deny in the affidavit of merits the value alleged in the statement of claim.

The appellants contend that the plaintiff failed to prove its case by a preponderance of the evidence. There is not the slightest merit in this contention.

As bearing upon the sincerity of all of the points now raised, save one, we may say that at the conclusion of the plaintiff's evidence the defendants made an oral motion for a finding in their behalf and the sole ground urged in support of the motion was that there was no proof as to the value of the materials furnished, and as we have heretofore shown, this point was without the slightest merit.

The appeal is devoid of merit and the judgment of the Municipal court of Chicago should be and it is affirmed.

AFFIRMED.

Kerner, P. J., and Gridley, J., concur.

The appellant now contends that the plaintiff failed to prove the value of the material furnished, as required by the statute. There is no merit in this contention. The plaintiff's statement of claim alleges that matter to the value of \$114.50 and is admitted to the premises. This is not denied in the affidavit of denial of the appellant, and therefore, under Rule 12, sec. (2), of the Municipal Court, it stands admitted. The appellant made no effort to prove that the matter was not of the value alleged in the statement of claim, and, indeed, as the plaintiff claims, they would have been precluded from so doing because they failed to deny in the affidavit of denial the value alleged in the statement of claim.

The appellant contends that the plaintiff failed to prove the value by a preponderance of the evidence. There is no merit in this contention.

In betting upon the sincerity of all of the points now raised, save one, we say not that as the contention of the plaintiff's evidence the defendant made no oral motion for a finding in their behalf and the sole ground urged in support of the motion was that there was no proof as to the value of the material furnished, and as we have intimated above, this point can without the slightest

The argument is devoid of merit and the judgment of the Municipal Court of Chicago should be and it is affirmed.

35924

EDWARD C. CAMP, formerly doing
business as Camp's Dairy Supply
House,

Appellant,

v.

LOUIS COHEN and MYER TURBOV,
Appellees.

15 / A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

267 I.A. 624⁴

MR. JUSTICE SCAMLAN DELIVERED THE OPINION OF THE COURT.

On November 12, 1931, the plaintiff (appellant) caused a judgment by confession to be entered in his favor and against the defendants, Louis Cohen and Myer Turbov (appellees), in the amount of \$1,496.85. On January 14, 1932, the defendants filed a verified petition praying that the judgment entered be vacated and set aside. When the petition came on to be heard the plaintiff "objected to the jurisdiction of the Court to entertain said motion, and also objected to the sufficiency of said Petition." The objections were overruled and thereupon an order was entered "that said judgment be opened, that leave be and hereby is given to the defendant to appear and to make defense herein, that a trial of this cause be had notwithstanding said judgment, that said judgment stand as security, and that execution herein be stayed until the further order of this Court, and that the affidavit stand as affidavit of merits in this cause." The plaintiff has prayed an appeal from the entry of this order.

The defendants have moved this court to dismiss the instant appeal, upon the ground "that the appeal was taken from an order allowing a motion to vacate a judgment by confession entered on the 14th day of January, A. D. 1932, and giving the

10000

MINISTRE DE LA JUSTICE
BUREAU DE LA JUSTICE
OTTAWA

Appelant

v.

LEONARD J. BROWN
Appellee

LEONARD J. BROWN

Appelant

287 I.A. 624

RE: JUSTICE MINISTER'S DECISION ON THE APPEAL

On November 11, 1941, the plaintiff (appellee) received

a judgment by confession to be entered in his favor and against
the defendant, Louis John and Myer Turner (appellee), in the
sum of \$1,444.44. On January 14, 1942, the defendant filed
a verified petition praying that the judgment should be vacated
and set aside. When the petition came on to be heard the plain-
tiff objected to the jurisdiction of the court to entertain said
petition, and also objected to the maintenance of said petition.

The objections were overruled and judgment in favor was entered
"that said judgment be opened, that leave be and hereby is given

to the defendant to appear and to make further motion, that a writ
of habeas corpus be had notwithstanding said judgment, that said judgment
stand as a nullity, and that execution thereon be stayed until
the further order of this court, and that the writs be issued on
affidavit of motion in this cause." The plaintiff has moved an
appeal from the entry of this order.

The defendant have moved this court to dismiss the
instant appeal, upon the ground "that the appeal was taken from
an order allowing a motion to vacate a judgment by confession

defendants leave to appear and make defense therein, and that a trial of the cause be had, which said order is not such a final order as is contemplated by Section 91, Chapter 110 of Smith-Hurd's Revised Statutes, 1931, and that by reason thereof, this court cannot acquire jurisdiction of the subject matter." Par. 91, sec. 91, ch. 110, Cahill's Ill. Rev. St., 1931, provides: "Appeals shall lie to and writs of error from the appellate or supreme court, as may be allowed by law, to review the final judgments, orders or decrees of any of the circuit courts, the superior court of Cook county, the county courts or the city courts and other courts from which appeals and to which writs of error may be allowed by law, in any suit or proceeding at law or in chancery." A final judgment reviewable by appeal or writ of error must be such decision of the court as settles the rights of the parties respecting the subject matter of the suit or some definite and separate branch thereof and which concludes them until reversed or set aside. (Orwig v. Conley, 322 Ill. 291.) An order opening up a judgment by confession and granting leave to plead is not a final order, but merely interlocutory, and is not appealable. (See Farmers Bank of North Henderson v. Stenfeldt, 258 Ill. App. 428, and cases therein cited; also Lavenson & Sons v. Adelson, 232 Ill. App. 461, and cases therein cited. The plaintiff cites, in support of his contention that the order appealed from is a final one, Belley v. Klein, 257 Ill. App. 171, 175, but that case has no application to the motion now before us.

We hold that the order appealed from is not a final one and is not appealable, and the motion of the defendants to dismiss the instant appeal, at appellant's costs, is allowed.

APPEAL DISMISSED AT APPELLANT'S COSTS.

Kerner, P. J., and Gridley, J., concur.

determine leave to appeal and make necessary orders, and that a
 trial of the cause be had, which would occur in not much a time
 as is contemplated by section 114, chapter 114 of the Laws of
 the State of New York, and that by reason thereof, this court
 cannot exercise jurisdiction of the subject matter. 100 N. Y. 2d
 61, 62. 110 N. Y. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

36071

CHICAGO TITLE AND TRUST COMPANY,
a corporation,
Complainant and Appellee,

v.

ANDREW J. VLACHOS et al.,
Defendants.

HERCULES J. VLACHOS,
Co-Defendant and Appellant.

1527
INTERLOCUTORY

APPEAL FROM INTERLOCUTORY
ORDER OF THE CIRCUIT COURT
OF COOK COUNTY APPOINTING
A RECEIVER.

267 I.A. 625'

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Hercules J. Vlachos from an interlocutory order appointing a receiver upon a bill to foreclose a trust deed securing a bond issue of \$20,000.

The appellant contends that "the bill of complaint was insufficient to warrant the granting of any relief, for the reason that the bill did not allege that the Atlas Exchange National Bank of Chicago was the owner of any bond or bonds whatsoever." The bill contained, inter alia, the following allegation:

"That subsequent to the said default, on, to-wit: January 15, 1932, your orator, as Trustee under the Trust Deed herein sought to be foreclosed, was served with a written notice specifying the said defaults and demanding that your orator file its bill to foreclose said Trust Deed, which written notice is as follows:

'January 15th, 1932.

Chicago Title & Trust Company,
69 West Washington Street,
Chicago, Illinois.

Gentlemen:

The undersigned, Atlas Exchange National Bank of Chicago, notified you that it is the legal owner and holder of bonds of the face value amounting to sixty-seven Hundred Dollars (\$6700.00) and that it is the owner and holder of the interest coupons evidencing the interest on said bonds, which bonds and interest coupons were executed and are secured by a trust deed made by Andrew J. Vlachos (divorced and not remarried), to Chicago Title & Trust Company, as

1701

CHICAGO TITLE & TRUST COMPANY,
a corporation,
Complainant and Appellant,

v.

JOHN J. VANDERBILT, JR.,
Defendant.

JOSEPHINE B. VANDERBILT,
Co-Defendant and Appellant.

IN SENATE, JANUARY 1, 1904.

This is an appeal by Josephine B. Vanderbilt from an

interlocutory order appointing a receiver upon a bill in foreclosure
a trust deed securing a bond issue of \$100,000.

The appellant contends that "the bill in foreclosure was

insufficient to warrant the granting of any relief, for the reason

that the bill did not allege that the said mortgage contained any

of which was the name of any bond or mortgage certificate." The bill

contained the following allegations:

"That assignment to the said title, and receiver January
25, 1903, your HONOR, as trustee under the trust deed herein secured
to be foreclosed, was served with a citation requiring him
said trustee to show cause why he should not be appointed
receiver said title deed, which within notice is as follows:

January 1, 1904.

CHICAGO TITLE & TRUST COMPANY,
of the County of Cook,
Illinois.

Complainant, alias mortgagee, hereby seeks to foreclose
the mortgage herein, and to have the same sold at public sale of the
premises and land in the title deed and bill of sale of the
said mortgagee to the Chicago Title & Trust Company (1903, 1904) and
that it is the duty and right of the mortgagee to foreclose
the mortgage on said premises, which would and interest mortgage were
the mortgagee on said premises, which would and interest mortgage were

Trustee, bearing date May 1, 1928, and recorded in the Registrar's Office of Cook County, Illinois, as Document No. 408725; said bonds being a part of the total issue of bonds secured by said trust deed aggregating the principal sum of Twenty Thousand Dollars (\$20,000.00).

You are further notified that default has been made in the payment of principal amounting to One Thousand Dollars (\$1,000.00) due on May 1, 1931, and also in the payment of interest on each of said bonds as called for by interest coupons due on November 1, 1931, in the payment of said interest; that said default still continues and has continued for more than twenty days last past; that on account of said default, the undersigned has elected to declare, and does declare, immediately due payable the entire principal indebtedness described in and secured by said trust deed, together with all interest thereon, and the undersigned does hereby request and demand of you, said Chicago Title & Trust Company, as Trustee, as aforesaid, to institute proceedings to foreclose the lien of said trust deed in order to satisfy the indebtedness secured thereby, and the undersigned offers to give you, under and in accordance with the terms of said trust deed, such indemnity as you may require,

Atlas Exchange National Bank of Chicago.
By Litsinger, Healy, Reid & Bye,
Its Agents and Attorneys.'

and that said defaults nor any part thereof, were not remedied within twenty (20) days and such defaults still continue."

The bill alleges that the premises involved are located at 5511 Diversey avenue, Chicago; that they were improved with a brick building containing one store and two five-room apartments; that the premises had a frontage of 25 feet on Fullerton avenue, and a depth of 125 feet; that the gross rental received from the premises did not exceed \$2,200 per year, and that the net income therefrom was \$1,400 per year, out of which sum it was necessary to pay taxes, interest and pre-payments on the mortgage; that the interest amounted to \$1,200 per year; that a pre-payment of \$1,000 became due on May 1, 1932; that the maker of the note and trust deed involved was insolvent; that the market value of the premises was \$18,000; that the premises had been sold for taxes six times; that there had been a default in the prepayment due May 1, 1931, and a default in the interest payments which fell due on November 1, 1931; that \$1,000 of the original mortgage indebtedness, amounting to \$20,000 had been paid, leaving an unpaid balance on account of the principal thereof of \$19,000.

The bill was filed March 10, 1932. On March 14, 1932, the appellant and others were notified that an application for the appointment of a receiver would be made on March 15, 1932. On the last date the motion was continued until March 17, 1932. Then the motion came on to be heard, but before the order appointing the receiver had been entered, the appellant filed a demurrer to the bill, in which he "demurs to said bill and for cause of demurrer shown:

I. That it is not alleged in and by said bill of complaint that the Atlas Exchange National Bank of Chicago was the legal owner and holder of any of the bonds or interest coupons secured by the trust deed herein sought to be foreclosed." The trust deed provides as follows: "The Trustee in lieu of or in addition to the right of entry as hereinbefore provided may in case of default and the continuance thereof in the payment of principal or interest * * * and on the written request of the holder of any one or more of the then outstanding bonds * * * shall * * * cause this indenture to be foreclosed. * * * And in case default and the continuance thereof * * * shall be made in any other covenant, condition or agreement * * * the Trustee may and on the written request of the holders of not less than twenty per cent of the then outstanding bonds * * * shall * * * cause this indenture to be foreclosed." Under these provisions the trustee had the undoubted right to commence the foreclosure proceedings of its own accord, and it was not a condition precedent of its right to bring foreclosure proceedings that it had been requested to do so by a bondholder. In Reliance Bank & Trust Co. v. Dalacy, 263 Ill. App. 546, the contention was made that the court erred in appointing a receiver because the bill did not allege that the trustee had been requested in writing by the holder of one or more bonds to institute foreclosure proceedings. The trust deed in that case gave to the trustee similar powers to those

The bill was filed March 14, 1934, in March 14, 1934.

The appellant and others were notified that an application for

the appointment of a receiver would be made on March 14, 1934, in

the last day the motion was continued until March 14, 1934. When

the motion came on to be heard, but before the order appointing the

receiver had been entered, the appellant filed a demurrer to the bill,

in which he claimed to said bill and for cause of demurrer showed:

1. That it is not alleged in said bill of complaint that the

Alban Exchange National Bank of Chicago was the legal owner and holder

of any of the bonds or interest coupons secured by the trust deed

hereto sought to be foreclosed. The trust deed provided as follows:

"The Trustee in lieu of or in addition to the right of entry on herein-

before provided may in case of default and the continuance thereof in

the payment of principal or interest * * * and on the written request

of the holder of any one or more of the then outstanding bonds * * *

shall * * * cause this instrument to be foreclosed. * * * and in case

default and the continuance thereof * * * shall be made in any other

event, condition or agreement * * * the Trustee may and on the

written request of the holder of any less than twenty per cent of the

then outstanding bonds * * * shall * * * cause this instrument to be

foreclosed." Under these provisions the trustee had the undoubted

right to commence the foreclosure proceedings at its own accord, and

it was not a condition precedent of its right to bring foreclosure

proceedings that it had been requested to do so by a bondholder. In

Salomon Bank & Trust Co. v. Salomon, 222 Ill. App. 2d, 195, the commission

has made that the court acted in appointing a receiver because the bill

did not allege that the foreclosed was requested to assist for the

benefit of one or more bonds or interests foreclosed proceedings. The

trust deed in that case gave to the trustee similar power to those

contained in the trust deed now before us, and we held (p. 553): "No article in the trust deed places any limitations on the broad power conferred upon the trustee by article 11, and article 8 simply provides a method by which the trustee may be compelled to foreclose. The trustee in the instant case had the undoubted right to commence the foreclosure proceedings, and there is no merit in the instant contention." Chicago Title & Trust Co. v. Hektor, 170 Ill. App. 68, cited by appellant in support of its contention, merely held that one not the owner of a bond secured by a trust deed has no authority to direct a foreclosure by the trustee named in such trust deed for default of the mortgagor. There is no merit in the instant contention.

The appellant next contends that "it was error to appoint a receiver when the sufficiency of the bill was challenged by a demurrer, specifically pointing out the defects in the bill, without first ruling upon the demurrer." Upon the instant appeal we are not concerned as to whether or not it would have been better practice for the chancellor to have passed upon the demurrer before appointing the receiver. Was the bill fatally defective, as alleged by the appellant, is the material question, and we are satisfied that question must be answered in the negative.

The last contention of the appellant, that "it is improper to appoint a receiver without first requiring a complainant's bond from the complainant, asking for such an appointment. To appoint a receiver and provide for the bond to be given by the complainant at a later date is not in compliance with the statute." The order appointing the receiver provided for the filing of the complainant's bond in ten days, and required the receiver's bond to be filed in ten days and also provided that the receiver should not enter upon his duties before giving such bond. It appears that the complainant filed its bond in seven days and the receiver filed his bond in nine

contained in the trust deed now before us, and we hold (p. 333):

"The estate in the trust deed places any limitations on the power conferred upon the trustee by article 11, and article 2 merely provides a method by which the trustee may be compelled to exercise. The trustee in the instant case had the undoubted right to commence the necessary proceedings, and there is no merit in the instant contention." Trustee v. Trustee, 171 N. 111, 112, 113.

and by relying in support of its contention, merely that it was not the owner of a bond secured by a trust deed nor is it entitled to direct a foreclosure by the trustee named in such trust deed for the benefit of the mortgagee. There is no merit in the instant contention. The appellant next contends that "it was error to appoint a receiver when the sufficiency of the bill was challenged by a demurrer, specifically raising the question as to the bill, without first ruling upon the demurrer." Upon the instant appeal we are not concerned as to whether or not it would have been better procedure for the chancellor to have passed upon the demurrer before appointing the receiver. Was the bill fatally defective, as alleged by the appellant, is the material question, and we are satisfied that question must be answered in the negative.

The last contention of the appellant, that "it is improper to appoint a receiver without first requiring a complainant's bond from the complainant, making the same a condition. To appoint a receiver and provide for the bond to be given by the complainant at a later date is not in compliance with the statute." The order appointing the receiver provided for the filing of the complainant's bond in ten days, and required the receiver's bond to be filed in ten days and also provided that the receiver should not order upon his notes before giving such bond. It appears that the complainant

days, so that at the time the receiver qualified the complainant's bond had been approved and was on file. In the recent case of Haugan v. Carr, 283 Ill. App. 333, 340, it appeared that the complainant's bond was not filed until a few days after the receiver's bond was filed, but the court held that that fact was a mere irregularity and of no consequence. There was no attempt by the appellant to contest the appointment upon the merits and he seeks here to have the order of appointment vacated upon mere technicalities.

The interlocutory order of the Circuit court of Cook county is affirmed.

APPROVED.

Kerner, P. J., and Gridley, J., concur.

677A
AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 625²

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 22 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A.D. 1931

HERMAN J. OHLS,

Appellee,

vs.

Appeal from the Circuit
Court of McHenry County

J. D. ALLEN, et al,

Appellants.

Jett, J:

This is an appeal brought to have reviewed a decree of the Circuit Court of McHenry County, Illinois.

During the year 1927 appellant, J.D. Allen, was the owner of the farm described in the bill of complaint filed herein. Appellee is and was a carpenter and contractor residing in Woodstock, McHenry County, Illinois, and had been so engaged for several years. During the month of May 1927 appellant, Allen, applied to appellee for an estimate upon the cost of remodeling the barn then standing upon the premises and received an estimate therefor in the sum of \$1,000.00. He also asked for an estimate upon the cost of building a new barn, size 40 x 60 feet. Appellee gave him an estimate of \$4,000.00. Appellant asked if some allowance could be made by using old lumber then in the old barn and appellee said \$200.00 could be allowed for same. Appellant then directed appellee to build the barn.

Later appellant, after a conversation with his tenant called upon appellee and stated that he desired the size of the barn to be 36 x 80 feet. No plans or specifications of any kind or character were furnished by appellant.

IN THE
COURT OF COMMONS
SOUTH DISTRICT

New York, A.D. 1937

Appeal from the Circuit
Court of Henry County

Appellee,

J. D. Allen, et al.

Appellants.

1937, 1:

This is an appeal brought to have reviewed a decree of the

Circuit Court of Henry County, Illinois.

During the year 1937 appellant, J. D. Allen, was the owner of

the land described in the bill of complaint filed herein. Appellee

is and was a carpenter and contractor residing in Henry County, Illinois,

and was at the time of the filing of the bill of complaint, a resident

of the County of Henry, Illinois, and was at the time of the filing of the

bill of complaint upon the cost of remodeling the barn then standing upon the

premises and received an estimate therefor in the sum of \$1,000.00.

He also asked for an estimate upon the cost of building a new barn,

and also asked for an estimate of \$4,000.00.

Appellant asked if some allowance could be made for raising the lumber

from in the old barn and appellee said \$200.00 could be allowed for

same. Appellant then insisted appellee to make the same.

After appellee, after a conversation with his tenant called

the appellee and stated that he desired the size of the barn to be

40 x 60 feet. No plans or specifications of any kind or character

were furnished by appellee.

Appellee applied to a lumber company for some plans of the character of building he believed appellant desired and upon receipt thereof supplied the same to the appellant. Soon thereafter appellant notified appellee that the plan supplied was all right and to build the new barn. No specifications of any sort, other than size, were given nor does it appear that any conversation was had or contract made as to the cost of the structure so directed to be built.

After receiving the direction to build a new barn appellee razed the old barn and began work upon the foundation and construction thereof according to the size desired. Appellee and appellant had frequent conversations on the premises and appellant from time to time indicated to appellee the various things he desired.

Appellee was also employed by appellant to build a machine shed, chicken houses, a corn crib and other buildings and to remodel the dwelling house upon the premises and an estimate of the cost of such work was made by appellee, but, little, if any, of the construction work appears to have been done in the manner contemplated when the estimates were made. Most of the work, if not all, was performed by appellee in such manner and of such material as was from time to time directed by appellant and many changes appear to have been made during the course of the work.

As the work progressed appellant paid to appellee various sums of money, either by check or by cash, the total amount of what was \$7,500.00 and in addition thereto the appellant paid for material and other labor accounts in the total sum of \$7,783.83.

There is no controversy between the parties as to the character of the work or services rendered or the character of quality of materials used and no complaint is made by appellant as to same or any part thereof, nor is there any denial by appellant that the

...the applicant to a number of other persons of the
...of building he believed would be of great benefit
...to the applicant. Upon inspection of the
...the applicant was not found to be a person of
...the applicant. In the opinion of the
...the applicant was not found to be a person of
...the applicant was not found to be a person of

...

After receiving the decision to build a new house
...the old house and began work upon the foundation and construction
...according to the size desired. The house was built on a
...on the premises and was found to be of
...the various things as desired.

The applicant was also employed by the applicant to build a new house
...a new house, a new car and other things and to remodel the
...the premises and an estimate of the cost of such
...by the applicant, but, little, if any, of the construction
...to have been done in the manner contemplated when the
...were made. Part of the work, it was found
...in each room and it was found that the cost of
...by the applicant and was found to be of great benefit
...the course of the work.

As the work progressed the applicant could not give the various sums
...either by check or by cash, the total amount of what was
...and in addition thereof the applicant paid for material
...in the total sum of \$7,702.00.

There is no receipt for the money paid to the applicant
...the type of receipt required by the applicant to be
...in the applicant's name and the applicant is not
...the applicant, but is found to be of great benefit

services were reasonably worth the sums charged therefor by appellee. The sole and only question presented in this record is:- Whether the work done by appellee was performed under a contract for a stipulated price or whether the same was performed under a contract upon a time and material basis. This presents a question of fact.

Appellee by his bill of complaint alleged a contract upon a time and material basis and that there is due to him under his contract for time and material the remaining sum of \$789.65.

Appellant by his answer contends that all of the work was performed under a contract for a definite and specific price and that the aggregate total of all was the sum of \$10,480.00.

Appellant Allen, after filing his answer herein, filed a cross bill in and by which it was alleged the making of various contracts for work and material for certain specific sums and that he had overpaid appellee and asked an accounting. Upon issues being joined the cause was referred to a Special Master in Chancery for proof and conclusions. The Master took the evidence of the parties and made his report to the court finding that the contract between the parties was not for specific sums but was for time and materials and that appellee was entitled to recover from appellant the sum of \$789.65 and recommended that a decree be entered by the court upon the original bill of complaint in favor of the appellee for such sum. Objections were filed to the Special Master's report but upon a hearing thereof were overruled and a decree was entered in accordance with the findings of the Special Master, from which decree this appeal is prosecuted.

We have carefully examined the record in this case and the evidence of the respective parties and it seems apparent that no contract for specific amounts was entered into between the parties unless the original estimate of \$3,800.00 for the building of the barn 40 x 60 feet and the direction to go ahead amounted to a contract. Assuming that this amounted to a contract, the fact

...with the ... of the ...

...the work done by ... was performed under a ... for a stipulated price or whether the same was performed under a contract upon a time and material basis. This presents a question of fact.

Appellant by his bill of complaint alleged a contract upon a time and material basis and that there is due to him under the contract for time and material the sum of \$738.00.

Appellant by his answer contends that all of the work was performed under a contract for a definite and specific price and that the aggregate total of all the work is \$1,400.00.

Appellant's bill of complaint, after filing his answer, filed a

...in and by which it was alleged the nature of various

...for work and material for certain specific work and that

...had accepted appellee and asked an accounting. Wherefore

...the same was returned to a Special Master in conformity

...and conclusions. The Master took the evidence of the

...and made his report to the court finding that the contract

...the parties was not for specific work but was for time and

...and that appellee was entitled to recover from appellee

...the sum of \$738.00 and recommended that a decree be entered by the

...the original bill of complaint in favor of the appellee

...the bill. Objections were filed to the Special Master's report

...and a hearing thereon was ordered and a decree was entered

...in accordance with the findings of the Special Master, from which

...appeal is presented.

...have carefully examined the report in this case and the

...of the respective parties and it seems apparent that no

...the specific work was entered into between the parties

...the original estimate of \$1,400.00 for the building of the

...and the direction to an agent amounted to a

is that it was completely abrogated and an entirely new and different building was designated and directed to be built by the appellant without any agreement or estimate of its cost and in such cases the law implies that a reasonable price is contemplated by the parties.

The barn constructed was not the usual and customary character of building commonly used for such purpose. The evidence discloses that it was completely sealed with yellow pine ceiling and the horse barn grained and varnished and the cow barn finished in white enamel.

It is apparent that even in the original conversation the razing of the old barn upon the premises was neither contemplated nor covered by the estimate given in the first instance. As the work progressed appellant gave various directions and had changes made and caused the buildings to be constructed in such way and in such manner as should meet his particular desires.

The dwelling house upon the premises was remodeled and the record fails to show any contract therefor between the parties for any specific sum of money.

It is true that an estimate was made concerning same but there is considerable difference between the parties as to the amount of such estimate and of the work to be performed thereunder. It is not contended that the remodeling of the house took place in accordance with any conversation had at the time the estimate was made, so it seems to us perfectly apparent that no definite sum of money was agreed upon by the parties for such work.

This conclusion is amply sustained by the evidence of both the parties herein. The character of the work performed and the manner in which the same was done and the circumstances under which it was completed indicates the almost impossibility of

[illegible]

It is not intended to be a statement of the views of the Government, but only of the views of the author.

It is suggested that when in the future the Commission is asked to consider the possibility of a new arrangement for the management of the old mine, the Commission should be aware of the fact that the mine is now owned by the Government and that the Commission should be aware of the fact that the mine is now owned by the Government and that the Commission should be aware of the fact that the mine is now owned by the Government.

The dwelling house upon the premises was searched and the following items were found:

It is not concluded that the position of the ship was
at each estimate and of the work to be performed there-
fore is considerable difference between the values as to the
77 is that an estimate was made concerning the

This conclusion is amply sustained by the evidence of both the character of the work performed and the

... (illegible) ...

making a definite estimate of the cost prior to completion of the buildings. A plan was furnished for the barn but no specifications as to size, type or character of materials to be used. A direction to remodel the house is given, but no definite specifications therefor.

Appellant directed appellee to purchase materials where they could be purchased the cheapest. If he had a definite contract this would be a subject of no interest to him. The appellant paid various material bills and it seems unreasonable to expect that he would pay these material bills if there had been a contract for a definite sum.

Appellant says very frankly in his testimony that he knew nothing about building and employed appellee because of his great confidence in him and that appellee did do the work well and satisfactorily.

All of these facts and circumstances seem to imply that neither party understood nor contemplated that the labor and services rendered was or was intended to be under a contract for a specific sum but rather the inference is, that the contract contemplated that the work should be performed satisfactorily to the appellant and that appellee should be paid the usual, reasonable and customary price for same and it is apparent from the evidence herein that the prices charged are the usual, reasonable and customary prices therefor.

In our opinion the evidence in this case abundantly supports the contention that the contract between the parties was for the construction and remodeling of the buildings as requested and that the contractor was to receive, not a fixed price, but the usual and customary price for the services rendered and that the prices charged by appellee are the usual, reasonable and customary prices for the services performed and the decree of the Circuit Court should be affirmed, which is accordingly done.³

Decree affirmed.⁴

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

78 7
begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:
Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 625³

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 22 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
Second District

October Term, A.D. 1931.

THE ROCKWOOD SPRINKLER COMPANY
OF ILLINOIS, a Corporation,

Appellee,

-VS-

Appeal from the Circuit
Court of Winnebago
County.

THE SWORDS COMPANY, a Corporation,
formerly SWORDS BROS. COMPANY, a
corporation,

Appellant.

Jett, J.

This appeal is prosecuted to have reviewed a record and judgment of the Circuit Court of Winnebago County in the sum of \$6,158.68.

Appellee (plaintiff in trial court) was engaged in the business of manufacturing and selling parts and supplies for sprinkler systems. The appellant (defendant in trial court) was engaged in the business of contracting and installing plumbing, heating, electric and sprinkler systems.

For the purposes of this opinion the appellee hereinafter will be referred to as plaintiff, and appellant as defendant.

The declaration of plaintiff consists of the common counts, together with a copy of the account sued on and an affidavit of claim. Upon motion a bill of particulars was filed.

Defendant pleaded the general issue, with its affidavit of merits, in which it was admitted that the defendant had purchased the merchandise described in the bill of particulars but alleged that on or about May 1st, 1928, it had, by its duly authorized agent, entered into a verbal agreement with the authorized agent

IN THE
COURT OF COMMONS

October 1st, A.D. 1911.

THE ROYAL BANK OF CANADA
(Incorporated in Canada)

THE ROYAL BANK OF CANADA
(Incorporated in Canada)

THE ROYAL BANK OF CANADA
(Incorporated in Canada)

THE ROYAL BANK OF CANADA

THE ROYAL BANK OF CANADA

This appeal is prosecuted to have reversed a verdict and judgment of the Circuit Court of Wisconsin County in the sum of \$1,132.00.

Appellee (plaintiff in trial court) was engaged in the business of manufacturing and selling boots and supplies for various purposes. The appellant (defendant in trial court) was engaged in the business of contracting and installing plumbing, heating, electric and gas work.

Appellee's account.

For the purpose of this opinion the appellee hereinafter will be referred to as plaintiff, and appellant as defendant.

The declaration of plaintiff consists of the common counts, together with a copy of the account and an affidavit of claim. Upon motion a bill of particulars was filed.

Defendant pleaded the general issue, with the affidavit of denial, in which it was stated that the account was fraudulent.

The particulars described in the bill of particulars was alleged that on or about May 1st, 1910, it had, by its duly authorized agent, entered into a verbal agreement with the defendant agent

of the plaintiff for the purchase of certain merchandise from plaintiff and by the terms of the said agreement defendant was to pay plaintiff the same price for each item so purchased as merchandise of like kind and character could be purchased from The Grinnell Company. It was further alleged that although the defendant had purchased from plaintiff the various articles of merchandise as disclosed in the bill of particulars filed in this cause, it had not promised to pay the prices charged by plaintiff, but did promise to pay for such merchandise an amount equal to the price charged for like merchandise by The Grinnell Company, and that the prices charged by plaintiff and shown in its bill of particulars were much greater than the prices of The Grinnell Company for like merchandise, and that by reason of such agreement the defendant had been overcharged by the plaintiff in the sum of \$4,442.90, and averred that the defendant owed to the plaintiff only the sum of \$1,869.78. Thereafter, an order was entered allowing the pleading to be amended but the nature of such amendments is not disclosed in the record here.

Trial was had before a jury in the said court. At the close of all the evidence plaintiff moved the court to instruct the jury to find a verdict for it. This motion was overruled by the Court and the instruction tendered therewith refused. The case went to the jury and it returned a verdict in favor of plaintiff against defendant for the sum of \$6,158.68. Motions for a new trial and in arrest of judgment were presented to the Court, but were overruled and judgment entered upon the verdict, from which this appeal is prosecuted.

There is no controversy between the parties as to the purchase and delivery of the materials listed in the bills and invoices of plaintiff. Substantially the only question in controversy is the question of whether the defendant was to pay the prices charged by the plaintiff for such merchandise or the prices claimed to be

the plaintiff for the purpose of making a statement in
evidence and of the fact of the sale of the goods to the
plaintiff the same price for each item as purchased by
the plaintiff and the fact that the plaintiff had purchased from
the defendant the same price for each item as purchased from
the defendant. It was further alleged that although the
plaintiff had purchased from the defendant the various articles of
merchandise as disclosed in the bill of particulars filed in this
case, it had not promised to pay the prices charged by the plaintiff,
but did promise to pay for such merchandise an amount equal to the
prices charged for like merchandise by the defendant company, and
that the prices charged by the plaintiff and shown in its bill of
particulars were much greater than the prices of the defendant
company for like merchandise, and that by reason of such agreement
the defendant had been overcharged by the plaintiff in the sum of
\$448.80, and averred that the defendant owed to the plaintiff
the sum of \$1,938.78. Thereafter, an order was entered
directing the plaintiff to be awarded but the nature of such award-
ment is not disclosed in the record here.

There was had before a jury in the said court. At the close
of all the evidence the plaintiff moved the court to instruct the jury
to find a verdict for it. This motion was overruled by the court
and the defendant moved for judgment. The jury went out
and it returned a verdict in favor of the plaintiff against
the defendant for the sum of \$1,938.78. Thereafter a new trial was
granted by the court and the case was retried. The jury returned
a verdict in favor of the plaintiff against the defendant for the
sum of \$1,938.78. Thereafter, an order was entered directing the
plaintiff to be awarded but the nature of such awardment is
not disclosed in the record here.

There is no material dispute between the parties as to the
evidence of the materials listed in the bills and invoices of
the plaintiff. Substantially the only question in controversy is the
question of whether the defendant was to pay the prices charged by
the plaintiff for such merchandise as the plaintiff alleged to be

charged for like merchandise as quoted by The Grinnell Company, in accordance with the alleged agreement between the parties of March, 1928.

It appears from the evidence that The Grinnell Company is engaged in the manufacture of substantially the same kind and quality of merchandise as plaintiff. The evidence discloses that the defendant and plaintiff had dealt with each other over a period of several years prior to the time of the transactions in this cause.

Defendant contends that it had entered into such agreement to purchase certain sprinkler parts and supplies from plaintiff at the prices quoted by The Grinnell Company during the month of March 1928.

It appears from the evidence that defendant, from time to time over the period from May 1st, 1928 to about October 31st, 1929, ordered various sprinkler parts and supplies from plaintiff. These orders were in each case prepared by the defendant upon its own forms and listed the materials desired, the specifications as to sizes, quantity, style, time and manner of shipment but contained no reference whatever to prices. The evidence further discloses that upon each shipment being made to the defendant by plaintiff, the plaintiff, within from one to four days thereafter, sent to the defendant an invoice or bill for the merchandise so shipped, showing the order numbers of both defendant and plaintiff, the place to which shipment was made, the description of the merchandise shipped and the unit net price as well as the total price for all merchandise of the order. Upon each of these bills was printed these words "terms cash," and "no claims allowed unless made within five days after receipt of goods."

During the period of time in question the defendant on several occasions demanded and received credits for errors in shipment, returned merchandise, etc., and credits by agreement.

It is urged on behalf of the defendant that the trial court erred in refusing to grant a new trial and in its refusal to allow

...for like merchandise as quoted by The Grinnell Company.

...with the alleged agreement between the parties of

March, 1928.

It appears from the evidence that The Grinnell Company is

...in the manufacture of substantially the same kind and

...of merchandise as plaintiff. The evidence discloses that

...plaintiff and defendant had dealt with each other over a period

of several years prior to the time of the transaction in this case.

Defendant contends that it had entered into such agreement to

...certain sprinkler parts and supplies from plaintiff at the

...by The Grinnell Company during the month of March 1928.

It appears from the evidence that defendant, from time to time

...the period from May 1st, 1928 to about October 1st, 1928,

...various sprinkler parts and supplies from plaintiff. These

...were in each case purchased by the defendant upon the

...and listed the materials desired, the specifications as to

...quantity, type, time and manner of shipment and contained

...reference thereto to prices. The evidence further discloses

...that upon each shipment being made to the defendant by plaintiff,

...plaintiff, within from one to four days thereafter, sent to the

...defendant an invoice or bill for the merchandise so shipped, showing

...the items shipped and the prices therefor.

...shipments were made, the description of the merchandise shipped

...and the price therefor were set out in the invoice. The bill

...of these bills was filed with the

...and the items shipped were

...of goods.

...the period of time in question the defendant received

...and received credits for excess in shipment,

...and credits by agreement.

...of the defendant and the trial court

...to grant a new trial and in its return to the

the introduction of certain evidence upon the trial, but these questions are not covered by the assignments of error. The question of the refusal of the Court to admit certain testimony upon the trial of the cause was not assigned as error. We are not required under the rules of this court to consider the admissibility of testimony complained of by the defendant. The record shows however that defendant offered to show by the witness Connors the contents of a certain memorandum of prices alleged to have been quoted by The Grinnell Company in March 1928. When it was sought to prove the contents of the said memorandum objection was made that no notice to produce the memorandum had been served upon plaintiff. It was then attempted by the defendant to lay the foundation for the introduction of secondary evidence of the contents of the memorandum. A. Mr. Wheeler and a Mr. Miller were called for that purpose. The record clearly discloses that no sufficient showing was made by defendant to authorize the admission of the testimony of Connors as to the contents of the memorandum. The record discloses, however, that the witnesses for defendant testified to The Grinnell Company prices orally and it is conceded by defendant that a comparative statement of The Grinnell Company prices was received in evidence.

It is also urged that the judgment is contrary to and not supported by the preponderance of the evidence.

The evidence disclosed a complicated course of procedure in the accounting department of plaintiff. No written objection was ever made by the defendant to the prices charged by the plaintiff, except a certain letter bearing date July 22nd, 1929 from one D. F. Swords, an officer of the defendant, to R. S. Ripple, then an officer of the plaintiff.

An examination of the entire evidence presented discloses a very sharp conflict in the testimony of the various witnesses produced by the respective parties bearing upon the question of the alleged agreement as to prices. Under such circumstances the determination as to where the preponderance of the evidence lies

the introduction of certain evidence upon the trial, but those
evidences are not covered by the assignments of error. The question
at the return of the court to admit certain testimony upon the trial
the court was not assigned as error. We are not required under
the rules of this court to consider the admissibility of testimony
suggested by the defendant. The record shows however that
defendant offered to show by the witness Gorman the contents of
a certain memorandum of prices alleged to have been received by the
Winnell Company in March 1933. When it was sought to prove the
contents of the said memorandum objection was made that no notice
to produce the memorandum had been served upon plaintiff. It was
then attempted by the defendant to lay the foundation for the in-
troduction of secondary evidence of the contents of the memorandum.
A. E. Wheeler and a Mr. Miller were called for that purpose. The
witnesses orally disclosed that no authentic showing was made by
defendant to authorize the admission of the testimony of Gorman
as to the contents of the memorandum. The record discloses, however,
that the witness for defendant testified to the Winnell Company
prices orally and it is conceded by defendant that a comparative
statement of the Winnell Company prices was received in evidence.
It is also urged that the judgment is contrary to and not
supported by the preponderance of the evidence.
The evidence disclosed a complicated course of procedure in
the record department of plaintiff. No written objection was
ever made by the defendant to the prices offered by the plaintiff,
except a certain letter bearing date July 1934, from the
defendant, an officer of the defendant, to R. E. Rife, then an
official of the plaintiff.
In examination of the entire evidence presented discloses a
very sharp conflict in the testimony of the various witnesses con-
cerning the respective parties bearing upon the question of the
alleged statement as to prices. Under such circumstances the

is peculiarly within the province of the jury.

The courts have frequently held that where there is a conflict of evidence on both sides and the facts and circumstances, by a fair and reasonable intendment, will warrant the inferences of the jury, courts will reluctantly, if ever, disturb their verdict. Lowry vs. Orr 1 Gilm. 70 page 83. Tolman vs. Race, 56 Illinois 477, page 478. Halty vs. Markel, 44 Ill. 225, page 228; Chicago City Railway Co. vs. Bohnow, 108 Ill. App. 346, page 352.

In Illinois Central Railroad Company vs Gillis, 68 Ill. 317, at page 319 the Court said: "If any rule of this court can be so well established as to be neither questioned nor require citation of authority to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony." Calvert vs. Carpenter, 96 Ill. 67; Shevalier vs. Seager, 121 Ill. 564 page 569; Bradley vs. Palmer, 193 Ill. 88; Lourance vs. Goodwin, 170 Ill. 393.

After a review of all the evidence in this case we are not prepared to hold that the verdict of the jury herein is manifestly against the weight of the evidence.

It is insisted by the defendant that the court erred in giving instructions one, three and four given on the part of the plaintiff in this, that the instructions assume the burden of proving The Grinnell Company prices by a preponderance of the evidence was on the defendant. The first instruction reads: "The Court instructs the jury that if they find from the evidence that the plaintiff has made out his case by a preponderance of the evidence, then the jury must find for the plaintiff." This instruction informed the jury that the burden of proof is on the plaintiff and the jury would certainly take this to mean that the plaintiff had the burden of

occasionally within the province of the jury.

The courts have frequently held that where there is a conflict

evidence on both sides and the facts and circumstances, by a fair

reasonable inference, will warrant the inference of the jury.

It will reluctantly, it ever, stand their verdict. See, for

example, 70 page 35. Tolson vs. Rice, 33 Illinois 477, page 478.

See also, 33 Illinois 477, page 478.

See also, 33 Illinois 477, page 478.

In Illinois General Railroad Company vs. Ellis, 33 Ill. 317,

page 319 the Court said: "If any rule of this court can be so

established as to be neither questioned nor requiring citation

to support it, it is that a verdict will not be set

aside where there is a consistency of evidence, and the facts

circumstances, by a fair and reasonable inference, will authorize

verdict, notwithstanding it may appear to be against the strength

weight of the testimony." See, for example, 33 Ill. 317.

See also, 33 Ill. 317, page 319.

After a review of all the evidence in this case we are not

disposed to hold that the verdict of the jury herein is manifestly

erroneous. The weight of the evidence.

It is insisted by the defendant that the court erred in giving

instructions one, three and four given on the part of the plaintiff.

First, that the instructions carried the burden of proving the

defendant's liability upon a preponderance of the evidence was on

the defendant. The first instruction reads: "The court instructs

the jury that if they find from the evidence that the plaintiff has

proved his case by a preponderance of the evidence, then the jury

shall find for the plaintiff." This instruction imposed the burden

of proof on the plaintiff and the jury would

likely take this to mean that the plaintiff had the burden of

proving that no agreement was made for reduced prices, and instructions three and four contain nothing that would lead them to think otherwise for said instructions do not purport to inform the jury where the burden of proof lies. Furthermore the issue in this case was simple and it would not have been misunderstood by the jury. Either the claimed agreement of March 1928 was made or it was not made. If made the defendant was entitled to the reduced prices claimed by it, if it was not made the plaintiff was entitled to the prices charged by it. If instructions three and four are erroneous as contended by the defendant in assuming that the burden of proof was on the defendant to show the claimed contract of March 1928, then the defendant's instructions two and three contain the same assumption and were given apparently on the same theory. It is a well settled rule that a party cannot complain on appeal of an alleged error in his opponents instructions when the same is contained in his own instructions.

It is also argued by the defendant that instructions three and four given for plaintiff are erroneous in that they refer to the prices charged by The Grinnell Company for similar goods on the dates when sales were made; that the giving of instructions three and four on the part of the plaintiff were reversible error because they were not based on the evidence; that they referred to the price contentions of the defendant as being prices charged by The Grinnell Company for similar goods on the dates when the sales were made. The defendant claims that the prices to be charged for the special equipment were to be the same as the prices quoted by The Grinnell Company to the defendant in March, 1928, commencing May 1st, 1928. We have carefully read plaintiff's instructions three and four as well as defendant's instructions two and three. In view of the objections to instructions three and four given on the part of plaintiff it will be necessary to set out in part instruction No. Two given on the part of defendant. It reads as follows: "The court instructs the jury that if they

...that no agreement was made for reduced prices, and in-
structions three and four contain nothing that would lead them to
...also advise for said instructions do not amount to instructions
...they were the burden of proof lies. Furthermore the issue
...this case was simple and it could not have been misinterpreted
...the fact. When the claimed agreement of March 1933 was made
...it was not made. It made the defendant was entitled to the re-
duced prices claimed by it, at it was not made the plaintiff was en-
titled to the prices charged by it. If instructions three and four
...instructions as contended by the defendant in assuming that the
...of fact was on the defendant to show the claimed contract
...that, then the defendant's instructions are not valid
...for some reason and this gives rise to the question
...it is a valid contract. It is a valid contract and it is
...it is alleged error in his opponent's instructions when the
...is contained in his own instructions.
...It is also argued by the defendant that instructions three
...four given for plaintiff are erroneous in that they refer to
...prices charged by The Grinnell Company for similar goods on
...cases when sales were made; that the giving of instructions
...two and four on the part of the plaintiff were reversible error
...because they were not based on the evidence; that they referred
...the price contention of the defendant as being prices charged
...The Grinnell Company for similar goods on the date when the
...sales were made. The defendant claims that the prices to be
...charged for the special equipment were to be the same as the
...sales quoted by The Grinnell Company to the defendant in March,
...the defendant may say, 1933. We have carefully read plaintiff's
...instructions three and four as well as defendant's instructions two
...and four. In view of the objections to instructions three and
...four by the part of plaintiff it will be necessary to set
...in last instruction No. Two given on the part of defendant.

believe from the evidence in this case that on or about May 1st, 1928 the plaintiff, acting through a duly authorized agent made and entered into an agreement with the defendant that if the defendant would purchase from the plaintiff wares, goods and merchandise for which the plaintiff seeks to recover in this case, the defendant would pay therefor to the plaintiff an amount for each and every item of such goods, wares and merchandise so purchased by the defendant from the plaintiff equal to and the same as the price for goods, wares and merchandise of like character and kind sold by a concern dealing therein known as The Grinnell Company. And if the jury further believe from the evidence that pursuant to such agreement defendant ordered and purchased the goods, wares and merchandise for which recovery is sought in this case from the plaintiff, and that the prices listed and attempted to be charged by the plaintiff for said goods, wares and merchandise so ordered and purchased as aforesaid by the defendant, or higher or greater in amount than the prices charged for goods, wares and merchandise of like character by The Grinnell Company; and that the difference between the amounts sought to be charged by the plaintiff for such goods, wares and merchandise in this case and the amount charged for such goods, wares and merchandise of the same character, quality and quantity by The Grinnell Company is \$4,738.90 then the jury are instructed, etc."

The defendant's third instruction contains similar language so it will clearly be noted that if plaintiff's instructions three and four are erroneous on the ground that they do not refer to the prices quoted by The Grinnell Company to the defendant in March 1928, then defendant's instructions two and three are erroneous on the same ground and defendant is accordingly estopped from objecting to plaintiff's instructions.

It will be observed that in the affidavit of merits filed by the defendant the defense set up is that the agreement entered into was

[illegible]

that the defendant would purchase from the plaintiff certain goods, wares and merchandise and that the defendant would pay therefor to the plaintiff an amount for each item of said merchandise so purchased as would be equal to and the same as the price of merchandise so purchased as would be equal to and the same as the price of merchandise of like character and kind sold by The Grinnell Company, and it is alleged in the affidavit that the defendant did not promise to pay the plaintiff the price for said merchandise charged in plaintiff's bill of particulars but did promise to pay for said merchandise an amount equal to the price charged for the same kind of merchandise sold by The Grinnell Company or prices quoted by The Grinnell Company for said merchandise. So it will readily be seen that the objections raised by the defendant to instructions three and four given on the part of plaintiff are found to be contained in instructions two and three of defendant. We are of the opinion that the objections made to instructions three and four are not well taken because they were given upon the same theory as the case evidently was tried on the part of the defendant judging from the instructions given by the defendant, together with its affidavit of merits.

If there be any merit in the contention of the defendant relative to instruction number one, in view of the simple issue as was presented we do not believe that the jury were in any way misled or that the instructions influenced the jury to the prejudice of the defendant.

We have investigated all of the questions raised by the defendant in support of its contention for a reversal of the judgment and we conclude, therefore, that in view of the state of the record the judgment of the Circuit Court of Winnebago County should be affirmed, which is accordingly done.

JUDGMENT AFFIRMED.

It is the defendant's contention that the plaintiff's evidence is not sufficient to establish that the defendant was negligent. The defendant's evidence is that the plaintiff was negligent in not taking proper precautions to prevent the accident. The court finds in favor of the defendant.

CONFIDENTIAL - EYES ONLY

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8424

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:
present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 625⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 29 1932 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1931.

General No. 8424

Agenda 61

P. E. Howard,
Appellee,

vs.

Appeal from the Circuit Court
of Kankakee County.

Estate of Benjamin P.
Roberts, Deceased,

Appellant.

JETT, J.

This is an appeal by the administrator of the estate of Benjamin P. Roberts, deceased, appellant, from an order allowing a claim in favor of P. E. Howard, appellee, for the sum of \$654.15. It appears that appellee filed a claim for services in the County Court of Kankakee County against the estate of Benjamin P. Roberts, deceased. The claim was sworn to as is required by statute and filed on the 20th day of February, 1930. On a hearing in the County Court of Kankakee County the claim was disallowed. From the judgment of the County Court appellee appealed to the Circuit Court of said County. The appeal was perfected by filing an appeal bond and transcript of the proceedings, although on the date of the trial the files failed to show the claim or copy thereof was included in the transcript from the County Court. On the trial of the case in the Circuit Court the transcript was amended by appellee by filing a copy of the claim as filed in the County Court and it was consented to by the administrator of the estate of Benjamin P. Roberts, deceased, appellant.

The record discloses that Benjamin P. Roberts in his lifetime was a constable and was engaged in an extensive collection

IN THE
APPELLATE COURT OF MISSISSIPPI
SECOND DISTRICT

Between John, A. A. Smith,

Appellant,

vs.

Appellee,

Remitted from the circuit court
of Hancock County.

Estate of Benjamin F.
Roberts, Deceased,

Appellee.

1917, 1.

This is an appeal by the administrator of the estate of Benjamin F. Roberts, deceased, appellant, from an order allowing a claim in favor of P. M. Howard, appellee, for the sum of \$250.00. It appears that appellee filed a claim for services as the County Court of Hancock County against the estate of Benjamin F. Roberts, deceased. The claim was sworn to as is required by statute and filed on the 10th day of February, 1917. At a hearing in the County Court of Hancock County the claim was disallowed. From the judgment of the County Court appellee appealed to the Circuit Court of said County. The appeal was sustained by filing an appeal bond and transcript of the proceedings, although on the date of the trial the trial failed to show the claim or copy thereof was included in the transcript from the County Court. On the trial at the case in the Circuit Court the transcript was amended by appellee by filing a copy of the claim as filed in the County Court and it was sustained by the administrator of the estate of Benjamin F. Roberts, deceased, appellee.

The record discloses that Benjamin F. Roberts in his lifetime was a considerable and was engaged in an extensive collection

business; that appellee did the clerical work for Roberts for a period covering a number of years for which he received no compensation. From the facts as disclosed on the hearing, he expected compensation for his services and Roberts expected to pay him therefor. On the hearing appellee offered in evidence his book account which consisted of loose ledger sheets kept in the back of the ledger which was used for store purposes. The ledger sheets were testified to as being kept by appellee in the usual course of business and were original entries, true and correct. The claim filed by appellee was a copy of the ledger. On the hearing of the cause appellant offered no evidence except the ledger in which appellee had kept a record of his work and this offer was made for comparison only.

A number of reasons are assigned for a reversal of the judgment.

In this court appellee has filed a motion to dismiss the appeal on the ground that the administrator did not have an appealable interest. The appeal was properly taken to the Appellate Court by the appellant. Kolb vs. Estate of Stephens, 176 Ill. App. 391.

It is argued by the appellant that the trial court had no jurisdiction of the subject matter because no sufficient transcript from the County Court appears in the record; that the transcript is jurisdictional and that the judgment is void. Appellant did not raise this point in the County Court or in the Circuit Court, and is raising it for the first time in this Court, and under the rule he has waived the point. The record discloses, however, that appellee perfected his appeal to the Circuit Court and everything was done which was necessary in order to give the Circuit Court jurisdiction of the case. There was no objection made to the bond filed in perfecting the appeal. The transcript from the County Court was filed by appellee; the county clerk certified that the transcript was a true and correct copy of the proceedings had on said claim in the County Court. It is true, however, that the transcript was insufficient in that the claim as presented in the

...that appellee did the clerical work for ...
...a period covering a number of years for which he received ...
...From the facts as disclosed on the hearing, he ...
...expected compensation for his services and ...
...pay his brother. On the hearing appellee offered in evidence ...
...his book account which consisted of loose ledger sheets kept in ...
...the back of the ledger which was used for store purposes. The ...
...ledger sheets were testified to as being kept by appellee in the ...
...usual course of business and were original entries, true and ...
...correct. The claim taken by appellee was a copy of the ledger. ...
...On the hearing of the cause appellee offered no evidence except ...
...the ledger in which appellee had kept a record of his work and ...
...this offer was made for compensation only.

A number of persons are assigned for a reversal of the judgment. ...
In this court appellee has filed a motion to dismiss the appeal ...
on the ground that the administrator did not have an appealable ...
interest. The appeal was properly taken to the Appellate Court ...
by the appellant. *Kohl vs. Estate of Thompson*, 175 Ill. App. 321. ...
It is stated by the appellant that the trial court was in ...
jurisdiction of the subject matter because an affidavit was sworn ...
that the County Court was in the County Court, and the ...
is jurisdictional and that the judgment is void. Appellate ...
relies this point in the County Court as in the County Court, and ...
is raised it for the first time in this Court, and under the rule ...
he has waived the point. The record discloses, however, that ...
appellee requested his appeal to the Circuit Court and everything ...
was done which was necessary in order to give the Circuit Court ...
jurisdiction of the case. There was no objection made to the fact ...
filed in perfecting the appeal. The transcript from the County ...
Court was filed by appellee; the County Court certified that the ...
transcript was a true and correct copy of the proceedings and on ...
this point to the County Court. It is true, however, that the

County Court was inadvertently omitted from said transcript and was brought to the attention of the attorneys during the trial, whereupon an amendment was made to said transcript by attorney for appellee, which was consented to by the attorney for appellant.

In our opinion the transcript and the filing of a copy of the claim filed in the County Court with the consent of the attorney for appellant made the transcript, and all proceedings relative thereto, a legal and valid transcript and claim in the Circuit Court and the Circuit Court therefor had jurisdiction of the case.

Appellant also contends that no amendment was made to the transcript. The abstract shows Mr. Jensen said: "I move the court for leave to amend transcript by filing a copy of the claim filed in the County Court." The Court: "Well, leave to amend. Why not allow this copy produced by Mr. Dyer to be filed, copy of the claim filed in the County Court?" Mr. Dyer, "All right." The Court: "It is agreed by counsel that it is a copy of the proceedings filed in the claim in the County Court." Document marked plaintiff's Exhibit 6, and the claim is there set out. In view of the state of the record the appellant is not in a position to insist that no amendment to the transcript was made.

It is contended by the appellant that the court erred in admitting the book account offered in evidence by appellee. Appellee was a competent witness in his own behalf as far as the book accounts were concerned although appellant was defending as administrator. Section 3, Chap. 51, Revised Statutes.

A copy of the claim filed in the Circuit Court with the consent of the appellant shows the date of the services, the number of hours, the price per hour and the total for the services on a particular date. The book account offered in evidence was a ledger kept by

appellee who had formerly been engaged in the grocery business. The ledger was not adapted to the keeping account of the particular services performed for the deceased, which services consisted of typewriting, clerical work and in the making of computations. The testimony introduced in evidence showed that the ledger sheets, which were the book accounts, were original entries kept in the ordinary course of business and were true and correct. This testimony laid the proper foundation for the introduction of appellee's book account. *Miller & Graves vs. Pretz*, 179 Ill. App. 204. We are inclined to think, however, that appellee was permitted to go farther than the rule would allow him to testify. He was permitted to state in the giving of his testimony as to the amount the book shows was due. This was not within the rule as we understand it but we are unable to see where the appellant was prejudiced thereby for it was merely a matter of computation. The appellee was corroborated by other evidence in the case and we think it was sufficient to make out a prima facie case that the estate was indebted to appellee, the appellants having offered no evidence to disapprove the prima facie case made by appellee.

It is also contended by appellant that the court made prejudicial remarks in the presence of the jury in calling the attention of appellee's counsel to the fact that he had failed to prove the date when his alleged claim was filed in the County Court and assumed that such a claim was filed and in calling upon appellant's counsel to stipulate as to when the alleged claim was filed. The question is, did the court abuse its discretion in calling attention to the subject matter complained of by appellant relative to the date of the filing of the claim. Appellant insists that in making this suggestion to appellee the Court assumed that a claim was filed in the County Court. It will be remembered that appellant's counsel agreed that a copy of the claim as filed in the County Court should be admitted for the purpose of making complete the transcript from

Appellee had formerly been engaged in the grocery business. The ledger was not admitted to the hearing account of the plaintiff services performed for the deceased, and the services consisted in the following, which was not in the nature of compensation, but testimony introduced in evidence showed that the ledger account, which were the book accounts, were original entries and in the ordinary course of business and were true and correct. This testimony laid the proper foundation for the introduction of appellee's book account. Miller & Jones vs. Brock, 100 W. 2d 100. It was testified to that, however, that appellee was not allowed to go further than the wife would allow him to testify. He was permitted to state in the giving of his testimony as to how much the book shows was due. This was not within the wife as we understand it but we are unable to see where the appellant was introduced thereby for it was merely a matter of computation. The appellee was corroborated by other witnesses in the fact that the book is not sufficient to make out a prima facie case that the appellee was indebted to appellee, the appellant having offered no evidence to disprove the prima facie case made by appellee. It is also contended by appellee that the court made some mistake in the presence of the jury in asking the question of appellee's account to the fact that he had failed to give the date when his alleged claim was filed in the County Court and answered that such a claim was filed and in failing to answer the question as to when the alleged claim was filed. The question is, did the court abuse its discretion in asking the question to the subject matter complained of by appellee relative to the date of the filing of the claim. Appellant insists that in asking this question to appellee the Court assumed that a claim was filed in the County Court. It will be remembered that appellant's answer stated that a copy of the claim as filed in the County Court should be admitted for the purpose of making complete the transcript there

the County Court to the Circuit Court. Counsel knew that a sworn claim was filed in the County Court. Counsel for appellant agreed that the claim filed in the County Court was filed on the 20th day of February, 1930, which would bring it within a year of the death of appellant's intestate and within a year from the appointing of an administrator. Appellant stipulated as to the date of the filing of the claim in the County Court but objected to the introduction of it as evidence, after the evidence was in and the arguments were completed. It was a matter within the sound discretion of the court to determine whether or not the proof should be permitted to be made as sought by appellee. It is urged that the court made prejudicial remarks when it said: "Well, can you stipulate or shall they introduce the record? It is competent proof and it must be made. Do you agree that this claim was filed in the Probate Court against this estate on the 20th day of February, 1930?" If this had not been a fact counsel for appellant could have refused to agree to it and such refusal would have required appellee to make the proof. If appellee could not have made the proof appellant could have profited thereby. The action of the court was in keeping with the idea that it was not prejudicial to permit a fact to be proven or admitted that would lead to the ends of justice.

It is urged by the appellant that the Court erred in refusing an instruction offered by him. In view of the fact that appellant stipulated and agreed that the claim against the estate of the deceased was filed in the County Court on the 20th day of February, 1930, it was proper to refuse the instruction as that point was undisputed, having been agreed to by counsel. This instruction simply informed the jury that the burden of proof was on the claimant to establish his claim as filed in the County Court of

Kankakee County, and that he filed the same within one year after letters of administration were granted. Evidently appellant had in mind that it was incumbent on the appellee to prove that his claim was sworn to as filed in the Circuit Court. Since no claim was filed with the transcript in the Circuit Court, appellee supplied this defect by motion which was consented to by appellant by filing a copy of the sworn claim as filed in the County Court. We are unable to see that any error was committed by the Court in refusing this instruction.

Other suggestions are made by appellant. We have examined them and do not think they constitute reversible error. We are of the opinion that no reversible error was committed in the trial of the cause, and the Judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

1957-1958

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8444

17

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 625⁵

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 29 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1931

Metropolitan Casualty Insurance
Company of New York,

Appellee,

vs.

Appeal from the Circuit
Court of Winnebago County.

T. B. Luhman,

Appellant.

JETT, J:

This is an appeal brought by T. B. Luhman, appellant, to reverse a judgment for \$100.00 in favor of the Metropolitan Casualty Insurance Company of New York, appellee, being for money had and received by the appellant which the appellee insists in equity and good conscience belongs to it.

It appears that appellant was insured under an accident and health policy, issued by appellee, and suffered an injury which entitled him to recover under the policy. Appellant made proof of the claim and appellee in return delivered him a release to be signed upon the payment of \$314.00. Said release was executed under seal by appellant and released appellee from all claims, demands, damages and actions or causes of actions on account of injuries resulting or to result from a certain accident.

Appellee instituted suit in a Justice of the Peace Court claiming that it had made a mistake in the figures in the sum of \$100.00. The case was heard by the Justice of the Peace with a finding and judgment in favor of Luhman, appellant. An appeal

IN THE
APPELLATE COURT OF THE STATE OF NEW YORK
SECOND JUDICIAL DISTRICT

ROBERT J. BROWN, Plaintiff,

Metropolitan Casualty Insurance
Company of New York,

Defendant.

vs.

R. J. Brown,

Appellant.

1917, 1.

This is an appeal brought by R. J. Brown, appellant, to
reverse a judgment for \$100.00 in favor of the Metropolitan
Casualty Insurance Company of New York, defendant, being the sum
paid and received by the company which the appellant claims is
wrong and not recoverable under the policy.

It appears from appellant's papers that he is insured
and insured policy, issued by defendant, and entered in the
which entitled him to recover under the policy. Appellant was
owner of the vehicle and vehicle in which he was driving his car
was to be insured upon the payment of \$100.00. Said vehicle
was insured under said policy and appellant was insured under
all other, personal, domestic and other or other of similar
or other of similar nature as to which the policy was
accident.

Appellant is insured with in a contract of the Metropolitan
Company that it has made a contract in the State of New York
at \$100.00. The case was heard by the Justice of the Peace with
a finding and judgment in favor of appellant. An appeal

was prosecuted by appellee to the Circuit Court where the cause was tried by the court without the intervention of a jury, a jury having been waived by the parties, the result of which trial was that judgment was entered for appellee and against appellant in the sum of \$100.00, and the appellant prosecuted this appeal.

The facts were very largely stipulated. The following stipulation was entered into:

"It is hereby stipulated between North, Linscott, Gibboney & North, Attorneys for the Plaintiff, in the above entitled cause, and Hinchcliff, Miller & Thomas, Attorneys for the Defendant in said cause, as follows, to-wit:

That there was issued to the Defendant herein by the Plaintiff under Policy No. A-5725, dated October 28, 1926, Renewal No. A-5725 dated October 28, 1927, a health and accident policy which under the terms thereof entitled the insured to a weekly indemnity of Fifty Dollars (\$50.00) per week in case of an accident, and One Hundred Dollars (\$100.00) per week in case of an accident in a public carrier for total disability and one-half of the above amounts for partial disability; and that neither the original policy nor a copy thereof need be produced at the trial of this case;

And further the defendant herein suffered an accidental injury on June 26, 1928, at one o'clock, P.M. in the City of Chicago, Illinois, while riding in a Yellow Cab which is a public conveyance provided by a common carrier for passenger service; and entitled the insured to double indemnity under his policy; and that the defendant did execute and deliver to the Plaintiff one certain report of accident and notice of claim thereunder, which said report or affidavit of claim was received by the Plaintiff herein on September 18, 1928, and that said affidavit of claim was subscribed and sworn to by a Notary Public and that said report of injury is in conformity with the requirements of the policy;

And it is further stipulated that the accidental injury occurred during the time when the said policy of insurance was in full force and effect;

Pursuant to such claim the amount claimed thereunder was figured under the terms of the policy by a clerk in the office of the Plaintiff and that a draft, Plaintiff's Exhibit 3, was issued in payment of said claim; and that the defendant did pursuant to his receipt of the said draft, Plaintiff's Exhibit 3, make, execute and deliver his certain release to the plaintiff in consideration for the payment of said amount, which said release is hereby identified as Plaintiff's Exhibit 4.

has been waived by the court, the result of which was
was filed by the court at the instant of a jury trial
and presented by counsel for the United States.

...the sum of \$100.00 and the question presented is whether the sum of \$100.00 is sufficient to cover the cost of the trial.

The facts were very largely attested. The following

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"It is hereby stipulated between North, Lincoln, Gibney & North, Attorneys for the Plaintiff, in the above entitled cause, and Kinschiff, Miller & Thomas, Attorneys for the Defendant in said cause, as follows:

[illegible]

Further, the defendant herein suffered an accidental injury on June 22, 1938, at one o'clock, P. M., in the City of Chicago, Illinois, while riding in a Yellow Cab which is a public conveyance provided by a common carrier for passenger service; and entitled to the insurance as herein provided under his policy; and that the defendant did execute and deliver to the Wisconsin State Police a certain report of accident of claim under, which said report or affidavit of claim was filed by the Plaintiff herein on September 16, 1938; and that said affidavit of claim was subpoenaed and returned to by a County Judge and that said report of accident is in conformity with the requirements of the policy;

And it is further stipulated that the accident
occurred during the time when the said party
was in full force and effect.

[illegible]

Plaintiff will offer at the trial of the case, Plaintiff's Exhibit 2, and will offer evidence in support thereof.

Dated at Rockford, Illinois, this 23rd day of March, A.D. 1931.

North, Linscott, Gibboney & North,
Attorneys for Plaintiff.

Hinchcliff, Miller & Thomas,
Attorneys for Defendant."

Some testimony was heard in addition to the stipulation. Under the testimony heard in this cause, together with the stipulation entered into it is conclusively shown that Luhman, the appellant, sustained injury by reason of an accident in the month of June, 1928; that on September 18th, 1928, appellee company received proof of loss signed by the appellant and that by the proof of loss appellant was claiming one and two-sevenths weeks disability at \$100.00 per week and one and three-fourths weeks disability at \$50.00 per week; that owing to the mistake in computation appellee company, by its claim adjuster Robert T. Luce who was present at the time the case was heard and testified to those facts, made an error in computation of the amount due by figuring the one and two-sevenths weeks at \$100.00 per week at \$228.57, for which a draft was drawn payable to the appellant for \$314.14. The correct computation on the basis of the terms of the policy of the amount claimed by the appellant was \$200.00, making an over payment of \$100.00.

At the time the agent of appellee delivered the draft to the appellant the appellant spoke to the agent about the draft being more than he had made claim for and the agent of the company who delivered the draft to the appellant said that it was more, and the appellant said that they must know their figures and must know how they figured it.

It is readily admitted by the appellant in his testimony that he knew that the amount paid him was more than he had claimed.

Plaintiff will offer at the trial of the case,
Plaintiff's Exhibit 3, and will offer evidence in
support thereof.

Dated at Rockford, Illinois, this 24th day of
March, A.D. 1937.

North, Lincoln, Attorney at Law,
Attorneys for Plaintiff.

Hennel, Miller & Thomas,
Attorneys for Defendant.

These parties, who were in court at the time of the

trial, the testimony given in this case, and the
evidence introduced into it is respectively true and correct,
the plaintiff, sustained before the jury in the

case of the, that the defendant, that, that, that,

company, received from the defendant in the plaintiff and the
by the fact of the plaintiff was claiming the two-thirds

was a liability of \$200.00 per year and the plaintiff

was a liability of \$200.00 per year; that the plaintiff

is a corporation, and the plaintiff, by the plaintiff, is

T. that the plaintiff at the time the case was heard and

located at Rockford, and in fact in the plaintiff of the

amount due by the plaintiff to the defendant was \$200.00

per year at \$200.00, for which the plaintiff is liable at the

plaintiff in the plaintiff. The plaintiff is liable at the

the fact of the plaintiff of the amount claimed by the plaintiff

was \$200.00, making an over payment of \$100.00.

At the time the agent of the plaintiff delivered the draft to

the plaintiff the plaintiff was in the plaintiff and the

being with him he had some claim for the plaintiff of the plaintiff

and delivered the draft to the plaintiff and the plaintiff

and the plaintiff paid him and the plaintiff

most that the plaintiff

It is hereby advised by the plaintiff in the plaintiff

that he has that the amount paid the case that he has

Appellant was precluded by the terms of the policy of claiming disability other than continuous disability from the effect of the injury sustained. Three months elapsed from the time of the sustaining of the injury to the submitting of the claim of the appellant. He claimed a total of two and five-sevenths weeks being total and partial disability during that three months period. The terms of the policy were brought out by appellant in his cross-examination of Luce, the agent of appellee, and there was no motion to strike the answer so the terms of the policy were amply proven by the appellant. Especially is this true when taken in conjunction with the stipulation that it would not be necessary to introduce on the trial of the case a copy of the policy.

It is argued by the appellant that appellee should go into a court of equity on a bill to reform the receipt or release signed by the appellant which, however, does not appear in the abstract but which he has mentioned in his argument and referred the court to the record.

We do not regard this case as one as is contended for by the appellant. It is argued that the \$314.00 was given in order to obtain the release. It is true a release was obtained but the sum paid was in payment of a claim for injury that had been sustained by appellant, and it was the intention of appellee to pay the appellant for the injury sustained by him by virtue of the terms of the contract that is referred to in the stipulation and also brought out on cross-examination of the agent Luce by counsel for appellant. This suit is one to recover for money had and received. It was the desire of appellee to pay appellant for the injury he had sustained as stated by himself. In making the computation the agent of appellee made the mistake and paid \$100.00 too much. The appellant was not entitled to receive anything as disclosed by this record for the injury received other than for

the time that he was under disability as hereinbefore stated. We are unable to see where appellant has any legal right or claim to this \$100.00 that was mistakenly paid to him.

"An action of assumpsit will lie for money had and received for the use of the plaintiff wherever by means of a contract relation, the defendant has obtained possession of money which in justice he ought to refund." Arnold vs. Dodson, 272 Ill. 377-381; Jenson vs. Muting, 255 Ill. App. 514-517.

"Where a person by a mistake overpays another he may recover the sum thus overpaid notwithstanding a receipt may have been given." Stempel vs. Thomas, 89 Ill. 146.

"Money paid by one to another by a mutual mistake of facts, in respect to which both were equally bound to inquire, may be recovered back in ~~assumpsit~~ under the count for money had and received." Wolfe, Exec. vs. Beaird, et al, Exec. 123 Ill. 585.

"Assumpsit for money had and received will always lie when ever one person has received money which belongs to another and which in justice and right should be returned." Wilson, Admr. vs. Turner, Exr. 164 Ill. 398.

It is argued by the appellant that the court erred in admitting Exhibit 2 which appears to be the figures made by the agent of appellee in determining the amount due appellant based upon the claim filed by him. The Exhibit does not appear in the abstract and under the rule, inasmuch as the appellant has not seen fit to include in his abstract of record copies of the Exhibit offered and admitted in evidence on the trial of the cause, he is not in a position to complain as to the rulings on the Exhibit. Reh fuss vs. Hill. 243 Ill. 140-151.

It must be kept in mind that the appellant having filed his claim for payment for injuries he had sustained under his policy it was then a matter for appellee to determine, since its liability was acknowledged, the amount due appellant by

the time that he was under disability as defendant's witness.
He was unable to see where knowledge was not legal, which he
again to this effect, that the defendant's claim is not
"An action of assumpsit will lie for money paid and
received for the use of the plaintiff's property or person if a
constant relation, the defendant has obtained possession of
money which in justice he ought to return." Arnold vs. Johnson,
105 Ill. 377-381; 30 Ill. 2d 414-417.
"There is a reason for a plaintiff's recovery in this
action. It is not because the defendant has received money
from him." Arnold vs. Johnson, 105 Ill. 381.
"Money paid by one to another by a mutual mistake of facts,
in respect to which both were equally bound to inquire, may be
recovered back as well as money paid for goods sold and
received." Wolfe vs. Kneo, 105 Ill. 382.
"Assumpsit for money paid and received will always lie when
one person has received money which belongs to another and
which in justice and right should be returned." Wilson, 105
Ill. 382.
It is argued by the appellant that the court erred in de-
termining liability which appears to be the figure set by the
court or appellee in determining the amount due appellant based
upon the claim filed by him. The Exhibit does not amount to the
defendant and under the law, however, as the court has not
seen fit to include in his contract is enough to set at naught
the claim offered and admitted in evidence on the part of the
plaintiff, as he is not in a position to establish as to the validity of
the Exhibit. Wilson vs. Kneo, 105 Ill. 382.
It must be held in favor of the appellant because the
claim for money for injuries is not established when the
plaintiff is not then a matter for appellee to determine, since
the liability was acknowledged, the amount due appellant by

virtue of the claim by him made. Appellee undertook to figure this amount, basing it upon his claim, and made a mistake of \$100.00. In other words appellant was overpaid \$100.00. It is very evident from this record that he was paid in full for the injuries sustained, based upon the terms of his policy. That being true he received \$100.00 that he was not entitled to receive. Appellee was entitled to recover from appellant any money that in equity and good conscience did not belong to him.

We conclude, therefore, that the judgment of the Circuit Court of Winnebago County should be affirmed, which is accordingly done.

JUDGMENT AFFIRMED.

It was stated that this person had been paid in full for the labor involved, based upon the terms of his contract. That person had been paid \$100.00 but he was not entitled to receive anything for services rendered in connection with the case. It was stated that the person was not entitled to receive anything for services rendered in connection with the case.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

10/7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 626'

BE IT REMEMBERED, that afterwards, to-wit: On

1 2 7 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court
of Illinois

Second District

October Term, A. D. 1931

Maria McGraren,

Defendant in error,

vs.

Louis Amarosi,

Plaintiff in error,

Error to the Circuit Court
of Lake County

Jett, J.

Maria McGraren, defendant in error, hereinafter referred to as plaintiff, instituted suit in the Circuit Court of Lake County against Louis Amarosi, plaintiff in error, hereinafter called defendant, to recover damages for an injury she claimed to have received by being run over by an automobile driven by the defendant.

The declaration filed by the plaintiff consists of three counts. The first avers that on March 11th, 1930, Louis Amarosi, the defendant, was driving and operating a certain automobile in an easterly direction in and upon a public highway known as Highland Park Deerfield Road at or near the intersection of Richfield Road, which highway was improved and paved with a concrete pavement twenty-four feet in width, in the City of Highland Park, and at said time and place plaintiff was walking in an easterly direction upon and over and across said public highway at and near the south edge of the concrete pavement therein; that it became and was the duty of defendant to manage, operate, drive and control his said automobile upon approaching plaintiff, while walking upon or along said public highway, to give reasonable warning of his approach and use every reasonable precaution to avoid injury to plaintiff and if necessary to stop his said motor vehicle until he could safely proceed, and the defendant not mindful of his duty and obligations in that respect then and there and while plaintiff was so walking upon,

In the Supreme Court

of Illinois

Between Plaintiff

and Defendant

JOHN J. HARRIS,

Plaintiff,

vs.

THE

ILLINOIS STATE

ROADS,

Defendant.

Case No. 100

JOHN J. HARRIS, Defendant in error, Petitioner

for a writ of habeas corpus, is by the Illinois Court of

Appeals, affirmed, and the writ is denied.

JOHN J. HARRIS, Defendant in error, Petitioner

for a writ of habeas corpus, is by the Illinois Court of

Appeals, affirmed, and the writ is denied.

The petition filed by the plaintiff consists of

three counts. The first count is that on March 11th, 1930, John

Harris, the defendant, was driving and operating a certain auto-

mobile in an easterly direction in and upon a public highway known

as Highway 100 at or near the intersection of High-

way 100, which highway was improved and paved with a concrete

surface twenty-four feet in width, in the City of Springfield, Ill.

and at said time and place plaintiff was walking in an easterly

direction upon and over and across said public highway at and near

the south edge of the concrete pavement therein; that it became and

was the duty of defendant to manage, operate, drive and control his

said automobile upon approaching plaintiff, while walking upon or

along said public highway, to give reasonable warning of its approach

and use every reasonable precaution to avoid injury to plaintiff and

along and across Highland Park Deerfield Road, near the intersection as aforesaid, in utter disregard of his said duty, wilfully and wantonly drove, operated, managed and controlled his said automobile without stopping it upon approaching plaintiff so walking upon said highway and without giving any reasonable warning of his approach to the plaintiff, ran into and against the plaintiff then and there walking upon said highway and as a result of said collision plaintiff was violently thrown to and upon the ground and thereby she was rendered sick, sore, lame and disordered, and various muscles and bones in and about the plaintiff's body were torn, bruised, lacerated and broken and the plaintiff was and is sick, sore, lame and disordered therefrom; and as a result thereof plaintiff had been compelled to spend and become liable for large sums of money, to-wit; \$1,000 in an endeavor to be healed of her injuries so received and has been compelled to undergo great pain and suffering from hence hitherto.

In the second it is averred as in the first count that on March 11th, 1930, defendant was possessed of and operating a certain motor vehicle; that it became and was the duty of the defendant to so manage, operate, drive and control his said automobile on approaching plaintiff while on said public highway so as not to injure her, yet defendant not regarding his duty in that respect, without regard to plaintiff's safety, wilfully and wantonly drove and operated his said automobile or motor vehicle at a rate of forty miles per hour upon and against plaintiff and while plaintiff was in the exercise of due care and caution for her own safety, and as a direct result thereof she was cut, bruised and wounded about her head and other parts of her body and that she became sick, sore, lame and disordered therefrom and suffered great pain, etc.

The third count avers as in the first count that on March 11th, 1930, the defendant was possessed of and operating a certain motor vehicle at the place as declared in the first count, in an easterly direction in and upon Highland Park Deerfield Road at

[illegible][illegible][illegible]

and near the intersection of Richfield Road in the City of Highland Park; that the said Highland Park Deerfield Road was then and there a public highway paved with concrete twenty-four feet in width at and in the vicinity of Richfield Road, and was there well illuminated with electric lights at the intersection of said highways; and at the said time and place plaintiff was crossing said Highland Park Deerfield Road in an easterly direction at or near the said intersection with Richfield Road, and was then and there at or near the south edge of the concrete pavement in said Highland Park, Deerfield Road at or near the intersection of Richfield Road; That there was nothing to obstruct the view of the defendant and plaintiff was clearly visible to the defendant, and there was a large space north of the plaintiff in said highway, unused and unobstructed where defendant could safely pass plaintiff; that it became and was the duty of the defendant to so manage, operate, drive and control his said automobile so as not to come in contact with or against the plaintiff while she was upon said public highway, so as not to injure plaintiff, yet the defendant not regarding his duty in that behalf, wilfully and wantonly drove and operated his automobile at a high rate of speed upon and against the plaintiff and failed and neglected to stop and assist plaintiff after striking her as aforesaid, but continued his course along said highway; that as a result plaintiff was cut, bruised and wounded upon and about her head and other parts of her body, and divers tissues of her body were lacerated and torn, her nerves were shocked, divers bones were bruised and fractured and plaintiff became sick, sore lame and disordered therefrom and so remained for a long space of time, from hence hitherto, during all of which time she suffered great pain and anguish, both mental and physical, and will suffer great pain in the future, and she did lay out large sums of money in an endeavor to be healed of her cuts, bruises and disorders, and her coat, dress and wearing apparel to the extent of \$500 were destroyed, to the damage of the plaintiff of \$10,000.

To the declaration the defendant pleaded the general issue and a special plea. His special plea in effect reads as follows: "And for a further plea in this behalf the defendant, Louis Amerosi, says that he did not own, operate or control the automobile alleged to have caused the accident and injury to the plaintiff complained of, and of that the defendant puts himself upon the country." To which the plaintiff replied as follows; "and plaintiff as to the plea of the defendant by him first above pleaded and whereof he has put himself upon the country, does the like; and secondly the plaintiff as to the special plea of the defendant by him secondly above pleaded, wherein he says that he did not own, operate or control the automobile alleged to have caused the accident and injury to the plaintiff complained of and whereof he, the defendant, has put himself upon the country, does the like."

On the 10th day of March, 1931, the cause was set for hearing. On being called for trial the defendant did not appear and upon motion of the attorney for the plaintiff the defendant was called and defaulted although issue had been joined. Thereupon the record discloses that issues being joined a jury was called and the trial was had in the absence of the defendant with a finding in favor of the plaintiff in the sum of \$3,000. Subsequently and at the same term of court the defendant appeared and made a motion to set aside and vacate the verdict which was denied. Judgment was rendered upon the verdict and the defendant prosecutes this writ of error.

It appears that the Highland Park Road is improved with a pavement twenty-four feet wide but at the point in question, the intersection with the Richfield Road, the pavement is extended to a width of approximately thirty-seven feet. There is a slight bend in the road but the view is unobstructed for a distance of about 600 feet in each direction. There is no foot pavement at this point and pedestrians regularly use the paved portion of the road. At the intersection a city electric light was burning. The weather was clear and the moon was shining brightly. As the

plaintiff walked eastwardly along the road at about seven o'clock in the evening, at the extreme south edge of the pavement, she was struck by an automobile driven by the defendant who was driving a Ford sedan on the said highway, at a rate of speed of approximately thirty-five miles an hour; the defendant was driving in the same direction as the plaintiff was walking. When the plaintiff was struck she was thrown backward against the car then to the south side of the road on the dirt shoulder. After striking the plaintiff the defendant slowed up his car as though he intended to stop, he then looked backward but almost immediately started forward and drove away.

A witness by the ~~name~~ name of McNeill was driving his car about 100 feet behind the car of the defendant and had followed defendant for at least one-half mile at a speed of about thirty-five miles per hour; he saw the car strike the plaintiff. The witness Harder was driving his car about 150 feet behind the witness McNeill and when he came to the scene of the accident he stopped to assist McNeill but was requested by McNeill to follow the car that had struck the woman and to ascertain its number. At a point about 600 feet east of the place of injury the highway is crossed by a railroad; at this point the witness Sliter driving westwardly met a Ford sedan and another car following. Harder drove at a rate of about forty-five miles an hour in an effort to overtake the car which injured plaintiff and after driving nearly two miles he was able to read the license number of the Ford car. He took the number and delivered it to the officers of Highland Park. As a result of the injuries the plaintiff became unconscious and was taken to a hospital where she was treated by a physician. Her wrist was broken, two ribs were fractured, chest bruised, her nose broken in two or three places, certain nerves and ligaments were injured and she suffered numerous bruises upon her body. This injury occurred on a Tuesday and on the following Friday the attorney

The defendant was driving along the road at about seven o'clock in the morning, at the extreme south edge of the pavement, she was struck by an automobile driven by the defendant who was traveling westward on the said highway, at a rate of speed of approximately thirty-five miles an hour; the defendant was driving in the same direction as the plaintiff was walking. When the plaintiff was struck she was thrown backward against the car door to the right side of the road on the left shoulder. After striking the plaintiff the defendant drove on his way as though he intended to stop, he then turned around and almost immediately crossed the road.

A witness by the name of McNeill was driving his car about 100 feet behind the car of the defendant and had followed defendant for at least one-half mile at a speed of about thirty-five miles per hour; he saw the car strike the plaintiff. The witness Hender was driving his car about 150 feet behind the witness McNeill and when he came to the scene of the accident he stopped. He called McNeill but was requested by McNeill to follow the car back and struck the woman and to ascertain its number. At a point about 500 feet east of the place of injury the highway is crossed by a railroad; at this point the witness Hender turned right and went a short distance and another car following. Hender drove at a rate of about forty-five miles an hour in an effort to overtake the car which injured plaintiff and after passing it he said he was able to read the license number of the car. He said the number was delivered to him as the witness to plaintiff's car. A report of the injuries the plaintiff received immediately after the accident was a hospital where she was treated for a few days. Her eyes were broken, two ribs were fractured, chest bruised, her nose broken in two or three places, outside bones and ligaments were injured and she suffered numerous bruises upon her body. This information

for the plaintiff testified that the defendant in a conversation with him said he had struck the woman but did not stop because he thought at the time that he had run over a limb of a tree in the road.

A number of reasons are assigned for a reversal of the judgment, (1) that the verdict of the jury and the judgment of the court rendered thereon are not supported by the evidence; (2) that plaintiff pleaded that the defendant wilfully and wantonly inflicted the injuries suffered by her, and upon the trial failed to prove any wilfulness and wantonness, and because of such failure her action must fail; (3) the act of defendant in walking upon a highway at seven o'clock on a March evening, and walking in the same direction traffic was taking on the side she was walking on, constituted contributory negligence on ~~the~~ plaintiff's part, barring any recovery by her; (4) that there was no proof shown that defendant was the driver or owner of the car that inflicted the injuries on plaintiff; (5) that the verdict of the jury is excessive, and (6) that no negligence was shown on the part of defendant to entitle plaintiff to a verdict against him.

Judging from the argument of the plaintiff the fact that the defendant did not appear for some reason on the day of the trial it was considered that he was in default. It is disclosed by the record that he was not in default but on the contrary pleaded the general issue and a special plea denying the ownership and operation of the car in question. The record further discloses that the plaintiff joined issue on the pleas. Notwithstanding the fact that the defendant was not present at the trial of the cause, the pleas being on file and issue having been joined, it was incumbent upon the plaintiff to prove every essential averment in her declaration that was required to establish the liability of the defendant. The rule relied upon by the plaintiff that the question of the sufficiency of the evidence to sustain the verdict, is not a proper

The defendant testified that the defendant in a conversation with him said he had struck the woman but did not stop because he thought at the time that he had run over a limb of a tree in the road.

A number of reasons are assigned for a reversal of the judgment: (1) that the verdict of the jury and the judgment of the court rendered thereon was not supported by the evidence; (2) that the defendant's negligence was not shown; (3) that the defendant in striking near a high-velocity tail; (4) that there was no proof shown that defendant was at the scene of the accident; (5) that the verdict of the jury is excessive; and (6) that no negligence was shown on the part of defendant to enable the plaintiff to recover.

Turning then to the question of the plaintiff's recovery, it is noted that the defendant did not appear for some reason on the day of the trial. It is considered that he was an absconder. It is also noted on the record that he was not in default but on the contrary appeared at the trial and was heard by the court. The record further discloses that the plaintiff joined issue on the issue. Notwithstanding the fact that the defendant was not present at the trial of the cause, the court on the day of the trial found in favor of the plaintiff. The court also found that the defendant was at the scene of the accident and that the plaintiff was injured. It is also noted that the plaintiff was injured and that the defendant was at the scene of the accident. It is also noted that the plaintiff was injured and that the defendant was at the scene of the accident. It is also noted that the plaintiff was injured and that the defendant was at the scene of the accident.

subject for review, cannot be invoked for the reason the judgment is not one obtained pro confesso or by the default of the defendant.

The most serious question arising upon this record is whether or not the testimony on the part of the plaintiff sustains the finding of the jury and the judgment of the court. It is sought to charge in each count of the declaration, the defendant with wilful and wanton conduct. It is said in the argument that in each count of the declaration a wanton and wilful charge is averred against the defendant. The second count of the declaration, however, avers that the plaintiff was in the exercise of due care and caution for her own safety at the time of the injury complained of. To recover under the second count of the declaration the plaintiff was required to prove that she was in the exercise of ordinary care at the time and immediately before the injury. It is argued by the defendant that the plaintiff was guilty of contributory negligence. If it be true that the declaration charges wilful and wanton conduct on the part of the defendant in inflicting the injury complained of, and such charge is sustained by the evidence, then the mere fact that the plaintiff was guilty of contributory negligence would not be a defense under the first and third counts of the declaration. There is nothing in the record to show under what count or counts the jury found the defendant guilty. The verdict is a general one.

We have gone carefully through the evidence and in view of the state of the record we are not prepared to say that the plaintiff has proven her case as is laid in her declaration.

The plaintiff relies to sustain the judgment on the fact that the defendant defaulted. It is true the record discloses that the defendant was called and he failed to answer on the day the cause was set for trial. It is also true that the defendant had pleaded and the plaintiff joined issue previous to the calling of the case for trial. The record recites that issue was joined. In the condition of the record the plaintiff was called upon to prove her case and each material averment found in her declaration.

She was called upon to prove the injury as charged and the resulting damages. Since there may be another trial we refrain from expressing any opinion as to the evidence or the weight thereof. It will not be improper, however, to say that there are some elements of damages relied upon on which there is little, if any proof. It will be remembered that the judgment is for \$3,000 and the proof, according to our way of thinking, should be more explicit and more definite covering the question of the charge of wanton and wilful conduct and the elements that go to make up the damages claimed.

We conclude, therefore, that the judgment of the Circuit Court of Lake County should be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

1027
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottaws, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 L.A. 626²

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 17 1932 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court
of Illinois
Second District

October Term, A. D. 1931

H. A. Maurer & Company,
Incorporated,

appellant,

vs.

L. R. Jones,

appellee,

Appeal from the Circuit Court

of La Salle County

Jett, J.

H. A. Maurer & Company, incorporated, appellant, instituted suit against L. R. Jones, appellee, in a Justice of the Peace Court at Ottawa, Illinois, to recover upon a written contract for services alleged to have been performed by the appellant company for appellee in the adjustment of a fire loss. Before the Justice of the Peace a finding was had in favor of the appellant in the sum of \$480.00. The cause was appealed to the Circuit Court of La Salle County, where it was tried before the court without the intervention of a jury, and a finding was had in favor of appellee and judgment rendered against the appellant for costs of suit and appellant prosecuted an appeal to this court.

It appears that L. R. Jones, appellee, had a fire at his residence in the City of Ottawa, Illinois, on the night of October 25th, 1929; that on the next morning one J. Howard Johnson, an employee of the appellant company, called upon appellee and explained to him the business of his company was to represent the insured in a settlement of fire losses with insurance companies and asked him if he did not want to engage his company to represent him. It further appears that after considerable discussion the agent of appellant presented an instrument and filled out some blanks therein, which instrument was signed by appellee. The representative of the

In the Appellate Court

of Illinois

Second Division

October Term, A. D. 1937

N. A. Hansen & Company,

Respondent,

vs.

Appeal from the Circuit Court

of De Kalb County

N. R. Jones,

Appellant.

1937

N. A. Hansen & Company, Respondent, Appellant, instituted

suit against N. R. Jones, Appellee, in a Justice of the Peace Court

at Ottawa, Illinois, to recover upon a written contract for services

alleged to have been performed by the appellant company for appellee

in the adjustment of a fire loss. Before the Justice of the Peace

a finding was had in favor of the appellant in the sum of \$480.00.

The cause was appealed to the Circuit Court of De Kalb County,

where it was tried before the court without the intervention of

a jury, and a finding was had in favor of appellee and judgment

rendered against the appellant for costs of suit and appellant

presented an appeal to this court.

It appears that N. R. Jones, Appellee, had a fire at

his residence in the City of Ottawa, Illinois, on the night of

October 28th, 1936; that on the next morning one J. Howard Johnson,

an employee of the appellant company, called upon appellee and ex-

plained to him the business of his company was to represent the in-

sure to a settlement of fire losses with insurance companies and

asked him if he did not want to engage his company to represent him.

It further appears that after considerable discussion the result of

appellant presented an instrument and filled out some blank spaces,

which instrument was signed by appellee. The representative of the

appellant then made an inventory of the household goods and went to see a contractor relative to figuring the loss on the building. About two days after the appellant had been retained to make the adjustment, as it claims to have been, it sent its representative W. A. Glancy to Ottawa to make an estimate of loss on the building and this estimate was prepared by the appellant and submitted to appellee and totaled the sum of \$12,712.90. A little later on Glancy met the adjuster for the company holding the insurance upon the building and household goods and gave him a copy of the claim. The adjuster for the insurance company went over the figures and the next morning the two adjusters met and discussed Glancy's figures. An agreement of the amount of loss was arrived at and appellee was called in to sign the proof of loss, and a short time after that appellee was paid by the insurance company of the sum of \$8,000 for the loss on the building, being the face of the policy. It further appears that a statement for services was subsequently sent to appellee by the appellant company.

It is the contention of the appellant (1) that the court erred in admitting testimony on behalf of appellee to vary the terms of the written agreement; (2) that the manifest weight of the evidence is on the side of the appellant; (3) that the court erred in refusing to hold as law the propositions submitted to it on behalf of the appellant.

Appellant insists it was error for appellee to cross examine the witness Johnson as to the conversation had by him and appellee before the contract was prepared and signed; that it was error for appellee to offer testimony in support of his contention as to the terms of the agreement entered into before any contract was signed.

It is contended by appellee that the agreement was that if the loss was greater than the amount of the insurance then they would have no use for an adjuster. Appellee and Hall, his father-in-law, each testified that appellee stated that his loss on the furniture and also on the house was a total loss, more than the

Appellant also made an inventory of the household goods and was in

see a contractor relative to figuring the loss on the building. About two days after the appellant had been retained to make the adjustment, as it claims to have been, it sent its representative W. A. Gieny to Ottawa to make an estimate of loss on the building and this estimate was prepared by the appellant and submitted to

Appellee and totaled the sum of \$12,712.90. A little later on Gieny met the adjuster for the company holding the insurance upon the building and household goods and gave him a copy of the claim. The adjuster for the insurance company went over the figures and the next morning the two adjusters met and discussed Gieny's

figures. An agreement of the amount of loss was arrived at and appellee was called in to sign the proof of loss, and a short time after that appellee was called by the insurance company at the sum of \$6,000 for the loss on the building, being the loss of the policy. It further appears that a statement for services was subsequently sent to appellee by the appellant company.

It is the contention of the appellant (1) that the court erred in admitting testimony on behalf of appellee to verify the terms of the written agreement; (2) that the manifest weight of the evidence is on the side of the appellant; (3) that the court erred in refusing to hold as law the propositions submitted to it on behalf of the appellant.

Appellant insists it was error for appellee to cross examine the witness Johnson as to the conversation had by him and appellee before the contract was procured and signed; that it was error for appellee to offer testimony in support of his contention as to the terms of the agreement entered into before any contract was signed.

It is contended by appellee that the agreement was made at the time and place from the amount of the insurance was paid would have no use for an adjuster. The claim and bill, etc. were filed, and testified that appellee stated that his loss on the

amount of his insurance; that in either event there would be no use for an adjuster, that he, appellee, did not believe an adjuster could obtain more than the amount of the insurance, and that he would have no use for them; that Johnson insisted that the house was not a total loss, that is, not as great as the amount of the insurance upon it, and that appellant would assist in filing a claim upon the household goods free of charge, and would undertake to adjust the loss on the house, also free of charge, if the loss was greater than the value of the insurance, but if the loss upon the house was less than the amount of the insurance, then appellee should pay six per cent of the amount collected. To this appellee agreed upon the approval of Hall and thereupon Johnson produced a small printed form and filled in a few blanks, - - place of signing, date, rate of commission, etc., - - and appellee signed it. This is all contradicted by Johnson who states that the question of total loss or amount of insurance was not mentioned.

We have examined the record and it fails to disclose that any objection was made by the appellant to the testimony showing what the conversation was before entering into the contract. The record shows that appellant inquired, when its first witness Johnson was on the stand testifying, as to what was said by Johnson and appellee. It is also shown that on cross-examination appellee cross-examined the witness quite fully with reference to the conversation had relative to the employment of appellant before the execution of the alleged contract and that no objection was raised by the appellant to the cross-examination of the witness. It is also disclosed that when the witnesses for appellee were on the stand that they were examined and each testified as to what was said by the representative of the appellant company and appellee prior to the time of the signing of the alleged contract and appellant did not object. Since appellant interrogated its witness as to the conversation had with appellee prior to the signing of the contract, and on cross-examination he was examined fully with reference to

...of his insurance; that in either event there would be no loss for an adjuster, that he, appellee, did not believe an adjuster would obtain more than the amount of the insurance, and that he would have no use for them; that Johnson insisted that the loss was not a total loss, that is, not as great as the amount of the insurance upon it, and that appellee would assist in filling a claim upon the household goods free of charge, and would undertake to adjust the loss on the horse, also free of charge, if the loss was greater than the value of the insurance, but if the loss upon the horse was less than the amount of the insurance, then appellee would pay the balance of the amount collected. To this appellee agreed upon the recovery of all and interest between a small number of days and filled in a few blanks, -- a place of signing, date, rate of interest, etc. -- and a small amount of money was paid to the appellee by Johnson who stated that the question of total loss or amount of

and on cross-examination he was examined fully with reference to
the conversation had with appellee prior to the signing of the contract,
and direct testimony taken from him as to what he said to the
appellee at the time of the alleged contract and whether or
not they were examined and each testified as to what was said by
himself that when the witnesses for appellee went on the stand
by the appellant to the cross-examination of the witness. It is in
execution of the alleged contract and that no objection was raised
therein relative to the employment of appellee before the
cross-examination of the witness quite fully with reference to the conver-
sation. It is also shown that on cross-examination appellee
was on the stand testifying, as to what was said by Johnson and
that the conversation was before entering into the contract. The
fact any objection was made by the appellant to the testimony showing
to have examined the record and it fails to disclose

the conversation had with appellee and no objection was interposed thereto, appellant is not in any position to raise the question, as being error, for the first time in this court.

Furthermore since appellant failed to object to the testimony produced by appellee bearing upon what was said before the contract was signed, then the rule is that it cannot be raised by the appellant for the first time in this court.

In *Baker v. Fawcett*, 69 Ill. App. 300, at pages 303-304, the court said: "Aside from this, no objection was made in the trial court to the introduction of parol proof of the representations of the appellant, set forth in the special pleas, and such objection cannot be availed of for the first time in a court of review. The general rule that either party to an agreement which has been reduced to writing may insist that the writing alone shall be resorted to, to determine the terms and conditions of the agreement may be waived, and is waived if the parties enter mutually into a contest to establish the agreement by parol testimony. In the case at bar neither of the parties objected to the introduction of parol testimony, but each voluntarily produced and relied upon testimony of that character to maintain his position before the jury. There was therefore no legal reason or rule of evidence or pleading why testimony thus produced should not have been considered by the jury as applicable to the defense presented by the special pleas. * * * "

In *Whalen v. Stevens*, 193 Ill. 121, at pages 132-133, the court said: "Counsel for appellant now objects to so much of the foregoing evidence as relates to negotiations between the parties prior to the execution of the written agreement of partnership. No objection was made to the evidence when taken, nor among the objections to the Master's report is there any objection relating to the admission, exclusion or refusal to exclude evidence. The objections to the Master's report were ordered to stand as exceptions on the hearing. The hearing is limited to questions of this nature

the investigation had this result and no objection was taken.
However, attention is not to be paid to the evidence in
this case, for the time is this court.
The evidence shows that the witness in the
testimony given by the witness was not the only witness in
contact with the witness, but the witness is shown by the
evidence for the first time in this court.
In *John v. Stevens*, 123 Ill. 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

raised by the exceptions, and when such question is not so raised error cannot be assigned in respect to it. The objection comes too late."

It is quite evidence~~x~~ from what is disclosed by this record that the testimony that is now objected ~~by~~ to by the appellant was gone into by the appellant itself when its first witness was put upon the stand. In the cross-examination of such witness no objections were made by the appellant, and it is further disclosed that when appellee put his witnesses upon the stand and they were interrogated with reference to what was said by the respective parties, that is, the agent of the appellant and the appellee, relative to the alleged contract, no objection was interposed by the appellant and that being true, it cannot be raised for the first time in this court.

Appellant submitted four propositions of law to the court, all of which were refused. It is now assigned as error that the court committed error in refusing the propositions of law and each of them. We have examined the propositions and they are not based upon the evidence as disclosed by the record. The court did not commit any error in the refusal of them.

In view of the state of the record we are not prepared to say that the finding of the court was manifestly against the weight of the evidence, and since the court did not commit any error in the refusal of the propositions of law, the judgment of the Circuit Court of La Salle County will be affirmed.

Judgment Affirmed.

replied to the objection, and your Honor is not to allow
error cannot be assigned in respect to it. The objection comes

too late.

It is this statement that is objected to by the

prosecution that is objected to by the defendant

and was made by the defendant itself, and the first witness was

asked upon the stand. In the cross-examination of said witness he

admitted that he was not a member of the committee, and he is not a member

of the committee, and the witness was asked and they said

that when committee was formed he was not a member of the committee

and that is the point of the committee and the committee, re-

specting to the alleged contract, no objection was introduced by the

prosecution and that being true, it cannot be raised for the first

time in this court.

Defendant submitted some questions of law to the

court, all of which were refused. It is not assigned as error

that the court committed error in refusing the proposition of law

and that is true. It was claimed the proposition was that the

jury based upon the evidence as disclosed by the record. The court

did not commit any error as the result of this.

In view of the state of the record as the law stands

as set forth the Court of the court was correctly applied the

weight of the evidence, and that the jury did not commit any

error in the refusal of the proposition of law, and therefore no

the issue found to be before the jury will be affirmed.

Defendant affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8462

1037

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 626³

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 25 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1931

General No. 8462

Agenda 46

WILLIAM S. JANES,

Appellee,

vs.

Appeal from the Circuit
Court of DuPage County.

WILLIAM LEBOWITCH and
WILLIAM RYAN,
(WILLIAM LEBOWITCH,

Appellant)

JETT, J:

William S. Janes, appellee, brought suit against William Lebowitch and William Ryan in a Justice of the Peace Court in the County of DuPage to recover damages alleged to have been sustained to his automobile in a collision with a cab driven by William Ryan and owned by Lebowitch, appellant. A change of venue was taken and a trial was had before the Justice to whom the cause was removed with a finding against the appellee for costs of suit.

An appeal was prosecuted to the Circuit Court. On the trial in the Circuit Court the jury returned a verdict assessing appellee's damages at \$168.90, on which judgment was rendered. Wm. Lebowitch alone prosecuted this appeal.

In this court appellee failed to file a brief and argument and under rule 21 the cause could have been reversed pro forma and remanded.

We have examined the evidence and find it conflicting. From the facts as disclosed by the record this was peculiarly a case for a jury. The jury having passed upon the question of negligence we are not prepared to reverse the judgment on the ground that the finding of the jury bearing on the charge of negligence is manifestly against the weight of the evidence.

IN THE
APPELLATE COURT OF THE STATE OF NEW YORK
JULY TERM, 1905

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We have examined the instructions given on the part of appellee. No serious objection is made to the instructions other than instruction number six, which reads as follows: "The Court instructs the jury that the rule of law giving the driver approaching from the right the right-of-way over one approaching from the left does not apply when the automobile on the right is sufficiently far away so that if being driven with due care and within recognized limits of speed it will not reach the intersection until the automobile from the left can pass." It is said this instruction is bad on the ground that there is nothing in the statute relating to recognized limits of speed and that the Court failed in the series of instructions to inform the jury what was meant by the term 'recognized limits of speed.' The instruction is subject to criticism, but in connection with the series of instructions given, we do not believe that the defendant was prejudiced thereby.

We are not unmindful of the fact that the verdict in this case is not large but the finding so far as the question of damages are concerned should have been within the limits of the testimony. The record discloses that the plaintiff's car after the collision was towed to a repair shop at Wheaton, and from there taken by the plaintiff for scrap to the junk yard at Glen Ellyn where it was at the time of the trial.

A witness called to the stand to testify with reference to the damages sustained by the plaintiff testified that the cash market value of plaintiff's 1926 model Diana coupe at the time of the accident was not over \$50.00. Appellee produced evidence bearing upon the question as to what it would cost to repair his car and the amount was fixed at \$168.90. If it be true, and it is uncontradicted, that this car was not worth to

exceed \$50.00 at the time of the accident, then the mere fact that it would cost \$168.90 to purchase the parts which were damaged, destroyed or broken would be allowing a sum for damages greatly in excess of what the value of the car was before the collision. While we are of the opinion that the finding of the jury bearing upon the question of negligence of the respective parties was not manifestly against the weight of the testimony, nor are we in a position to say that the jury were misled in any way by reason of the giving of instructions, but we do believe from what is disclosed by the record that the verdict is excessive; that a remittitur of \$100.00 should have been entered by the appellee.

The judgment will be affirmed in favor of appellee and against the appellant in the sum of \$68.90, if appellee enters a remittitur within twenty days from the filing of the opinion. If appellee fails to enter a remittitur within twenty days from the time of the filing of the opinion then the judgment will be reversed and cause remanded for a new trial.

AFFIRMED UPON REMITTITUR, OTHERWISE
REVERSED AND REMANDED.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 626⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MUG 25 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
Second District

October Term, A.D. 1931

General No. 8471

Agenda No. 52

C. W. Frey,

Appellant,

vs.

Appeal from the Circuit Court
of Woodford County.

Henry Hunzinger,

Appellee.

JETT, J:

This was an action of debt instituted by C. W. Frey, appellant, in which he sought to recover the statutory penalty from Henry Hunzinger, appellee, for having cut various varieties of standing or growing trees on the land of the appellant without his permission. To the declaration a plea of nil debit was filed, issue was joined and cause submitted to a jury for determination. At the conclusion of all the evidence the court directed a verdict in favor of appellee and the appellant prosecuted this appeal.

The Statute which forms the basis of this action is as follows, viz:

"Any person who shall cut, fell, box, bore or destroy or carry away any black walnut, black, white, yellow or red oak, white-wood, poplar, wild cherry, blue ash, yellow or black locust, chestnut, coffee or sugar tree, or sapling, standing or growing upon land belonging to any other person or persons, without having first obtained permission so to do from the owner or owners of such lands, shall forfeit and pay for such tree or sapling, so cut, felled, boxed, bored or destroyed, the sum of \$8; and every person who shall cut, fell, box, bore or destroy any trees standing or growing upon land belonging to any other person or persons, without permission as aforesaid, shall forfeit and pay for every such tree or sapling, so cut, felled, boxed, or bored or destroyed, the sum of \$3.00."

IN THE
APPELLATE COURT OF VIRGINIA
Second District

October Term, 1911

Records No. 55

Appellate No. 84VI

Appeal from the District Court
of Loudoun County.

Appellee.

1911, 7.

This was an action of debt instituted by D. J. Jones, appellant, in which he sought to recover the statutory penalty from Henry Hunsinger, appellee, for having cut various varieties of sound-
ing or growing trees on the land of the appellee without his permission. To the testimony a plea of nil debet was filed.
At the conclusion of all the evidence the court directed a verdict in favor of appellee and the appellant excepted this verdict.
The Statute which forms the basis of this action is as follows:

"Any person who shall cut, fell, burn, or destroy or carry away any black walnut, black, white, yellow or red oak, white-wood, poplar, wild cherry, pine sap, yellow or black locust, chestnut, cotton or sugar tree, or sapling, standing on private land belonging to any other person or persons, without having first obtained permission so to do from the owner or owners of such lands, shall forfeit and pay for each tree so cut, felled, burned, or destroyed, the sum of \$5; and every person who shall cut, fell, burn, or destroy any trees standing or growing upon land belonging to any other person or persons, without permission as aforesaid, shall forfeit and pay for every such tree so cut, felled, burned, or destroyed, the sum of \$5.00."

This penal statute has been operative for many years, and was first construed in *Cushing v. Dill*, 2 Scam, 460, where it was held that an action brought under the Statute is in addition to the remedy at common law, and in order to subject anyone to its penalties, it must be shown that the Statute had been wilfully violated. In *Whitecraft v. Vanderver*, 12 Ill. 235, the court states that the object of the Statute is to furnish an additional remedy to the owner of the land, and also to punish the wrongdoer, and that in order to subject a party to such punishment, he must have committed the wrong knowingly and wilfully or under such circumstances as show him guilty of criminal negligence. In *Watkins v. Gale*, 13 Ill. 152, and in other later cases, these constructions were reaffirmed, and it is the settled law in this State that an action for the penalty provided by this Statute does not lie for an inadvertent trespass or where the cutting is ascribable to an honest belief on the part of the accused, that the land from which he cut was his own or that he had a license to cut therefrom, but only lies where the trespass is wilful or the defendant is criminally negligent.

The author of the article in *Ruling Case Law* on "Logs and Timber" says: "In order to prevent trespass upon timber lands, statutes have been passed in a number of states providing for punitive damages. These statutes are, however, usually held not to be designed to cover any case not involving wilful wrong and in the case of mistake or accident, recovery can be had only for the value of the injury actually sustained." 17 R.C.L. 1110.

Wilfully ordinarily means intentionally or not by accident, but in a penal statute, it means with evil intent or with legal malice or with a bad purpose. When applied to violation of a law it means purposely or obstinately, and describes the attitude of one who, having a free will or choice, either intentionally dis-

This penal statute has been operative for many years, and was first mentioned in *Quinn v. Hill*, 2 Conn. 460, where it was held

that an action brought under this statute is as much a tort

as a contract, and in order to subject anyone to its penalties,

it must be shown that the statute has been willfully violated.

In *Quinn v. Hill*, 2 Conn. 460, the court states that the

object of the statute is to furnish an additional remedy to the

owner of the land, and also to punish the wrongdoer, and that in

order to subject a party to such punishment, he must have committed

the wrong knowingly and willfully as shown by the facts of the

case. In *Quinn v. Hill*, 2 Conn. 460, the court held that

and in other later cases, these constitutional provisions were

not in the settled law in this State that an action for the penalty

provided by this statute does not lie for an inadvertent trespass

where the cutting is attributable to an honest belief on the part

of the accused, that the land was his own or that

he had a license to cut thereon, but only lies where the trespass

is willful or the defendant is criminally negligent.

The author of the article in *Ball's Law* on "Torts and

Crimes" says: "In order to prevent trespass upon rights of

others have been passed in a number of states providing for

penal damages. These statutes are, however, usually held not

to be designed to cover any case not involving willful wrong and

in the case of mistake or accident, recovery can be had only for

the value of the injury actually sustained." 17 C.C. 1110.

Willfully ordinarily means intentionally or not by accident,

but in a penal statute, it means with evil intent or with

malice or with a bad purpose. When applied to violation of a law

it means purposely or obstinately, and describes the attitude of

one who, having a free will or choice, either intentionally dis-

regards the Statute, or is plainly indifferent to its requirements. Bouvier's Law Dictionary.

It appears from the evidence that appellant is the owner in fee of the two hundred acres of land described in the declaration, of which approximately sixty acres was in timber pasture. He and appellee are well acquainted with one another, both having lived in the same community for many years. At the time appellee cut the trees, and for several years prior thereto, the land was in possession of Jake Hexamer as tenant, who lived thereon, and appellee resided about a mile and a half north and east thereof. In the winter of 1929 appellee asked appellant if he could buy some of the timber on this land, but was told by appellant that he would not sell it. In the latter part of January or the first of February, 1931, the tenant, with the assistance of others, was cutting wood in the timber pasture, and appellee came over and sought and obtained permission from the tenant to cut and clean up some of the down trees for fire wood. Appellee did this, and later, while so working, asked the tenant if it would be all right to cut down "a few hickory nut trees to mix in with this dry wood," and the tenant told him that if he wanted some of the hickories and black oaks, he could cut them as he, the tenant, would like to have them cleared out so he could get some more grass, and the pasture would be thereby improved. Acting upon this permission, appellee cut quite a number of standing hickory and black oak trees, and a few burr, white and red oaks and one elm tree.

The record in this case discloses an entire absence of evil intent, bad purpose, or wilful wrong upon the part of appellee. While he had no valid license to go upon this land and cut the standing trees, he was acting under the honest belief that he had permission to do so, and in response to a question propounded by the attorney for the appellant to the tenant, who testified on behalf of the appellant, inquiring how he, the tenant, happened to tell appellee that he could cut these trees, the tenant answered:

"Well, I thought that would be a good way to get the old logs and timber cleaned up and give me a little more grass. I thought I was doing right, but the way I understand now I wasn't." There is no substantial conflict in the evidence in this case, nor is the evidence susceptible of different inferences or conclusions, and with the record in this condition, the trial court at the conclusion of all the evidence very properly directed a verdict and rendered judgment thereon.

Under the authorities, it was incumbent upon the appellant to prove by a clear preponderance of the evidence, that appellee acted wilfully and knowingly, and the evidence must have been of such a character as to bring home to the jury a reasonable and well founded belief of the guilt of appellee. In the opinion of the trial court, the evidence submitted was not of this character. The determining test upon a motion to instruct the jury to find for a defendant is whether or not the evidence, with all reasonable inferences to be drawn therefrom, taken most strongly in favor of the plaintiff, fairly tended to prove the plaintiff's case and was sufficient to warrant a verdict in plaintiff's favor. *Swain v. City of Joliet*, 219 Ill. App. 123. Or as stated another way, the court should direct a verdict for a defendant only when the evidence given with all legitimate inferences that may be justifiably drawn therefrom, is insufficient to support a verdict for the plaintiff, so that if such a verdict be returned it must be set aside.

The judgment is in accordance with the law, and the undisputed facts, and is therefore affirmed.

JUDGMENT AFFIRMED.

well, I thought that would be a good way to get the old boys
and they seemed to give me a little more ground. I thought
I was doing right, but the way I understood was I wasn't. There
is an essential conflict in the evidence as presented, and
the evidence suggestive of different inferences or conclusions,
and with the record in this condition, the trial court of the
superior of all the evidence very properly directed a verdict
and rendered judgment thereon.

Under the authorities, it was incumbent upon the appellant
to prove by a clear preponderance of the evidence, that appellant
acted willfully and knowingly, and the evidence was not even so
much a character as to bring home to the jury a reasonable and
well founded belief of the guilt of appellant. In the opinion of
the trial court, the evidence submitted was not of this character.

The determining fact upon a motion to instruct the jury to find
as a defendant is whether or not the evidence, with all reasonable
inferences to be drawn therefrom, tends to establish in favor of
the defendant, fairly tends to show the defendant's innocence and
entitled him to a verdict in his favor. If the evidence, with all
reasonable inferences to be drawn therefrom, tends to establish in
favor of the defendant, it is the duty of the court to instruct the
jury to find a verdict for the defendant and to render judgment
thereon. If the evidence, with all reasonable inferences to be
drawn therefrom, tends to establish in favor of the plaintiff,
it is the duty of the court to instruct the jury to find a verdict
for the plaintiff and to render judgment thereon. If the evidence,
with all reasonable inferences to be drawn therefrom, is
inconclusive, it is the duty of the court to instruct the jury to
find a verdict for the defendant and to render judgment thereon.

GOODBYE MY FRIEND.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

1057
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 626

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 1 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1932.

Dennis L. Collins,

Appellee,

vs.

Appeal from the Circuit
Court of Henry County.

Insurance Company of North
America, a corporation,

Appellant

BALDWIN, J:

This is a suit brought in the Circuit Court of Henry County, Illinois, by the appellee (hereinafter called Plaintiff) against the appellant (hereinafter called Defendant) to recover upon two fire insurance policies issued to him by the appellant.

The amended declaration consisted of two counts, each of which alleged the execution and delivery of the insurance policy upon which suit is brought and which is set out in full in each count. The first count alleged that on October 5th, 1928, the barn of the plaintiff insured under such policy was destroyed by fire and that within fifteen days the plaintiff gave written notice thereof to the defendant at its office in Chicago and within sixty days thereafter delivered a particular account of the loss, and claimed damages to the extent of \$4,000.00.

The second count alleged substantially the same, except that the damage claimed was the sum of \$800.00 for the loss of hay alleged to have been destroyed in the said fire.

To such amended declaration the defendant filed six pleas pleading (1) the general issue; (2) a part of the terms of the

IN THE
COURT OF COMMONS
AT THE CITY OF LONDON

May Term, A. D. 1928.

James L. Sullivan,

vs.

vs.

James L. Sullivan
County of Henry County.

Insurance Company of North
Carolina, a corporation.

James L. Sullivan

James L. Sullivan

This is a writ brought in the County Court of Henry
County, Illinois, by the plaintiff (hereinafter called Plaintiff)
against the defendant (hereinafter called Defendant) to recover
upon two life insurance policies issued to him by the defendant.

The amended declaration consisted of two counts, each of
which alleged the execution and delivery of the insurance policy
upon which suit is brought and which is set out in full in each
count. The first count alleged that on October 21, 1924, the
body of the Plaintiff issued under such policy was destroyed
by fire and that within fifteen days the Plaintiff gave written
notice thereof to the Defendant at its office in Chicago and
within sixty days thereafter delivered a particular account of
the loss, and claimed damages to the extent of \$4,000.00.

The second count alleged substantially the same, except
that the damage claimed was the sum of \$500.00 for the loss of
any alleged to have been destroyed in the said fire.

To such amended declaration the Defendant filed six pleas
alleging (1) the general issue; (2) a neg of the terms of the

insurance contract concerning purchase of additional insurance and alleged a violation thereof by plaintiff in the purchase of other insurance and that thereby the policy declared upon became void; (3) the execution and delivery of a certain mortgage upon the premises in violation of the terms of the insurance policy; (4) the execution and delivery of a second mortgage upon the property in violation of the terms of the said insurance contract; (5) that the plaintiff had executed and delivered a chattel mortgage upon the property mentioned in the insurance contract in violation of the terms thereof; (6) that the plaintiff had made false and fraudulent statements concerning the property insured.

Replications were filed to each of said pleas and rejoinders were thereafter filed to such replications.

On February 25th, 1930 a jury was impaneled and a trial of the said cause started.

On February 26th, 1930 during the course of the trial the plaintiff moved for leave to file first and second additional counts to the declaration, which motion was allowed and the first and second additional counts were filed. The defendant then presented its motion for the withdrawal of a juror, a continuance and for leave to plead to such counts. This motion was allowed, the juror withdrawn and the cause continued.

Demurrers were interposed by defendant to the first and second additional counts.

On November 30th, 1930 the plaintiff obtained leave to file a third additional count, to which the defendant also interposed its demurrer and on January 9, 1931 the plaintiff filed his fourth, fifth, sixth and seventh additional counts to the declaration.

In the fourth additional count the plaintiff alleged substantially the same as in the former counts, except it was alleged that within fifteen days after the loss the plaintiff visited the agent of the defendant company and

insurance contract concerning purchase of additional insurance was
not alleged a violation thereof by plaintiff in the insurance
at other insurance and that thereby the policy declared wrong
became void; (3) the execution and delivery of a certain work-
gave upon the premises in violation of the terms of the insur-
ance policy; (4) the execution and delivery of a second work-
gave upon the property in violation of the terms of the said
insurance contract; (5) that the plaintiff had executed and
delivered a certain work-gave upon the premises mentioned in
the insurance contract in violation of the terms thereof; (6)
that the plaintiff had made false and fraudulent statements
concerning the property insured.

Rejoinders were filed on each of said facts and the

On February 28th, 1930 a jury was impaneled and a trial

On February 28th, 1930 during the course of the trial
the plaintiff moved for leave to file first and second additional
counts to the declaration, which motion was allowed and the first
and second additional counts were filed. The defendant then
presented the motion for the withdrawal of a jury, a continuance
and for leave to plead to each count. This motion was allowed
and the jury withdrawn and the cause continued.

Defendants were introduced by defendant to the first and

On November 30th, 1930 the plaintiff obtained leave to

introduce the defendant and on January 9, 1931 the plaintiff

to the declaration.

In the fourth additional count the plaintiff alleged

substantially the same as in the fourth count, except it was
alleged that within fifteen days after the loss the plaintiff
refused the agent of the defendant company and

advised him of the fact of the fire and of the loss of the property and that such agent, at the request of the plaintiff and for and on behalf of the plaintiff, advised the defendant in writing of the fact of the fire and of the property destroyed and that thereafter in response thereto the said defendant sent another of its agents to survey the premises and that such agent advised the plaintiff that the defendant would not pay the insurance.

The fifth count contained substantially the same allegations as the fourth, except that it related to the hay.

The sixth additional count contained substantially the same allegations as the others, except that facts were set forth concerning the notification of the agent purporting to excuse the plaintiff in giving written notice of the loss.

The seventh additional count is substantially the same as the sixth except that it related to the hay.

To these additional counts the defendant also interposed its demurrer, which afterward, upon hearing, was sustained as to the first and second additional counts and overruled as to the fourth, fifth, sixth and seventh additional counts and it was ordered that the pleas of the defendants theretofore filed stand as pleas to the fourth, fifth, sixth and seventh counts.

Thereafter, the defendant filed its additional pleas to the fourth, fifth, sixth and seventh additional counts, alleging that under the terms of the policy no suit could be maintained unless commenced within twelve months after the fire and alleged that the cause of action set forth in the fourth, fifth, sixth and seventh additional counts states a new cause of action, which was not commenced within twelve months next after the happening of such fire. To these additional pleas to such counts a demurrer of the plaintiff was interposed and upon

...of the fact of the fire and of the loss of the
property and that such agent, at the request of the plaintiff,
...and in behalf of the plaintiff, advised the
defendant in writing of the fact of the fire and of the
property destroyed and that defendant in response thereto
the said defendant sent another of its agents to survey the
premises and that such agent advised the plaintiff that the
defendant would not pay the insurance.

The fifth count contained substantially the same
allegations as the fourth, except that it related to the loss.

The sixth count contained substantially the same
allegations as the others, except that it was set
forth concerning the notification of the agent purporting
to excuse the plaintiff in giving written notice of the loss.
The seventh additional count in substantially the same as
the sixth except that it related to the loss.

To these additional counts the defendant also answered
its answer, which afterward, upon hearing, was amended as to
the first and second additional counts and amended as to
the fourth, fifth and seventh additional counts and it
was ordered that the pleas of the defendants thereto be filed
within six days to the fourth, fifth, sixth and seventh counts.

Thereafter, the defendant filed its additional pleas to
the fourth, fifth, sixth and seventh additional counts, alleging
that under the terms of the policy no suit could be maintained
unless commenced within twelve months after the fire and alleged
that the cause of action set forth in the fourth, fifth, sixth
and seventh additional counts stated a new cause of action,
which was not commenced within twelve months next after the
occurrence of such fire. To these additional pleas to such
counts a demurrer of the plaintiff was returned and upon

hearing thereof such demurrer was sustained by the court and such action is assigned as error. The defendant then elected to stand by such pleas.

The third additional count of the plaintiff was withdrawn and the cause proceeded upon the first and second amended counts and the fourth, fifth, sixth and seventh additional counts and the pleas thereto.

Trial was had by a jury, who returned a verdict for plaintiff in the sum of \$2,800.00; Motion for a new trial and in arrest of judgment were overruled and after ordering the plaintiff to remit the sum of \$1,100.00 the court entered a judgment against defendant for the sum of \$1,700.00. This appeal is prosecuted to reverse such judgment.

The facts in this case substantially are that the defendant owned a farm upon which was situated several buildings, including a barn with one or more sheds attached. On February 15th, 1926 the plaintiff applied to one John C. Fischer of Geneseo for the purchase of insurance against loss or damage by fire, lightning, tornado, cyclone and windstorm of the buildings upon his farm - among others, \$2,000.00 was upon the barn and sheds.

On August 15th, 1928 he likewise applied to said Fischer for insurance on hay and feed in the barn and sheds above mentioned. Fischer was connected with the First National Bank of Geneseo and is also engaged in the insurance business representing the defendant company. Insurance policies were issued by the defendant herein after such applications and countersigned by John C. Fischer, agent of the defendant.

On the night of October 5th, 1928 lightning struck the barn and it was burned, as was also the hay in the barn. On October 6th, the plaintiff talked with Mr. Fischer over the telephone and told him the barn and hay had burned and Fischer

...error which defendant was sustained by the court and
...error is assigned as error. The defendant may elect
to stand by such plea.

The third additional count of the complaint was dismissed.

and the fourth, fifth, sixth and seventh additional counts were
the plea thereof.

Trial was had by a jury, who returned a verdict for plaintiff.

Verdict in the sum of \$2,800.00; costs for a new trial and in
...of judgment were awarded and when ordering the plaintiff
to remit the sum of \$1,500.00 the court entered a judgment
against defendant for the sum of \$1,300.00. Whereupon he
proceeded to reverse such judgment.

The facts in this case substantially are that the defendant

...a new trial was ordered and when ordering the plaintiff
to remit the sum of \$1,500.00 the court entered a judgment

1938 the plaintiff applied to one John P. Fischer of Kansas City
the purchase of insurance against loss or damage by fire, lightning,
explosion, cyclone and windstorm at the building upon the
premises - among others, \$2,800.00 was upon the terms and conditions.

On August 12th, 1938 he likewise applied to said Fischer
for insurance on his car and truck for the same and other things
owned. Fischer was coming on with the first policy and it
was also also engaged in the insurance business and represented
the defendant company. Insurance policies were issued by
the defendant company after such application and consideration
by John P. Fischer, agent of the defendant.

On the night of October 25th, 1938, lightning struck the
premises and it was burned, as was also the hay in the barn. In
November 1938, the plaintiff talked with Mr. Fischer over the
telephone and told him the facts and they had burned and Fischer

said he would notify the company. Later in the day plaintiff called at the bank, with which Fischer was connected, and asked Fischer if he had notified the company and was told that the company had been notified and that plaintiff would hear from it in a few days. Later a Mr. Lathan, an adjuster for the defendant, called, and went to the farm of the plaintiff and made an examination of the premises. Afterward the defendant refused to pay the loss and this suit followed.

Certain questions have been raised by the parties herein upon various points and particularly upon the existence or placing of mortgages upon the property insured, but from our view of the case we do not regard a discussion of most of these questions material to our decision.

At common law it was permissible to join several causes of action in one suit and each cause of action was set forth in a declaration or statement, which was designated as a "count," particularly when more than one cause of action was embraced in one suit. Actually the word "count" was intended to and meant the whole declaration of the particular cause of action covered by it. Upon the joinder of several causes of action the several declarations or counts were commonly designated collectively as the declaration. Although these separate causes of action would be joined and prosecuted in one suit, yet each count was required to state fully and completely a cause of action. Finally the practice became such that the use of the various counts were introduced into the declaration not really to state separate causes of action, but rather to provide for a different form of stating the same cause of action and thereby escape the rule against duplicity. This practice has continued until it has now passed into and become regular practice and declarations now commonly consist of several counts, even though the separate causes of action set forth in each count are predica-

with an email notify the company. Later in the day plaintiff called at the bank, with a letter from the company, and was told that the company had been notified and that plaintiff would hear from it in a few days. Later a few days later, an attorney for the defendant, called, and went to the home of the plaintiff and made an examination of the premises. Afterward the defendant refused to pay the loss and this suit followed.

Certain questions have been raised by the parties herein upon various points and particularly upon the existence or placing of mortgages upon the premises involved, but from our view of the case we do not regard a discussion of most of these questions essential to our decision.

At common law it was considered to join several causes of action in one writ - as each cause of action was set forth in a declaration or statement, which was designated as a "count,"

in one writ. Actually the word "count" was introduced to and meant the whole declaration of the particular cause of action covered by it. Upon the joining of several causes of action the several declarations or counts were commonly distinguished collectively as the declaration. Although these separate causes of action would be joined and presented in one writ, yet each

count was required to state fully and completely a cause of action. Finally the practice became such that the use of the various counts were introduced into the declaration and finally to state separate causes of action, but rather to provide for a different form of stating the same cause of action and thereby secure the rule against duplicity. This practice has continued

until it has now passed into and become regular practice and declarations now commonly consist of several counts, even though the separate causes of action set forth in each count are predica-

ted upon one and the same transaction. Such practice is now commonly used to meet variations in proof upon the course of the trial. Although the practice of filing separate counts and stating the same cause of action in a different manner is recognized and permitted, yet each separate and distinct count must state a separate and distinct cause of action and must prevail or be defeated by reason of the matter set forth in the particular count as fully and completely as though there was but one count in the entire case. Thus each count must be an entire declaration as to the matters therein charged, and is subject to the same rules and limitations as the entire declaration.⁴

The insurance contract sued on herein contained a provision that "no suit or action on this policy for the recovery of any claim, shall be sustainable in any court of law or equity unless commenced within twelve months after the fire."

This provision in the insurance contract is a legal and valid provision and is binding upon the parties to this suit. This question was passed upon by this court in the case of *Jox vs. Aetna Casualty and Surety Company*, 243 Illinois Appellate 209, which was brought to recover upon an insurance policy containing a provision to the effect "that no action should lie against the company to recover under the policy unless brought within two years after the date of the occurrence resulting in the loss." In that case the original declaration consisted of one count, in which it was alleged, among other things, that full compliance with the terms and provisions of the policy had been made. Subsequently and more than two years after the occurrence of the loss an additional count was filed in which the plaintiff relied for recovery upon a waiver of certain conditions of the policy. The defendant then filed its plea alleging that the cause of action, as set forth in the

and from the fact that the defendant is not
entitled to any relief from the court in
the trial. Although the plaintiff is not
entitled to any relief from the court in
the trial, and although the plaintiff is not
entitled to any relief from the court in
the trial, the plaintiff is not entitled to
any relief from the court in the trial.

in the plaintiff's account as being and completely as though
there was but one count in the entire case. This case counts
must be an entire decision as to the plaintiff's liability,
and is subject to the same rules and limitations as the entire
decision.

The plaintiff's account as being and completely as though
there was but one count in the entire case. This case counts
must be an entire decision as to the plaintiff's liability,
and is subject to the same rules and limitations as the entire
decision.

This plaintiff is the plaintiff's account as being and completely as though
there was but one count in the entire case. This case counts
must be an entire decision as to the plaintiff's liability,
and is subject to the same rules and limitations as the entire
decision.

which was brought to recover upon an insurance policy
containing a provision to the effect that no action should
be brought against the company to recover under the policy unless
within two years after the date of the occurrence of the
loss. In that case the plaintiff's liability
was established at one count, in which it was alleged, among other
things, that the plaintiff's liability was established at one count.

the policy had been made. Subsequently and more than two years
after the occurrence of the loss an additional count was filed
in which the plaintiff's liability was established at one count.

is said the plaintiff's liability was established at one count.
The defendant then filed his
plea alleging that the cause of action, as set forth in the

additional count, did not occur within two years prior to the filing of said additional count. In passing upon this question the court said, on page 213: "The first count avers full compliance with all the terms of the policy. The additional count did not aver full compliance with the conditions of the policy, but relied upon a waiver of certain of those conditions. A different cause of action was stated by it - one which could be availed of only when brought within two years after the date of the loss. (Feder vs. Midland Casualty Company 513 Illinois 552; Carbone vs. Penn. Fire Insurance Company, 222 Ill. App. 560; Trichelle v. Sherman & Ellis, Inc., 259 Illinois Appellate 346 page 357; Heffron vs. Rochester German Insurance Company 220 Illinois 514)."

In the instant case the fourth, fifth, sixth and seventh additional counts were filed more than twelve months after the cause of action accrued and stated causes of action which could be prosecuted only if brought within the twelve months limitation period and such counts being filed after the expiration of that period are, under the terms and conditions of the contract of insurance and under the issues as herein attempted to be made up, barred by the limitations therein contained.

It follows, therefore, that the court erred in sustaining the plaintiff's demurrer to the defendant's pleas of limitation as to such counts. (Trichelle vs. Sherman & Ellis, Inc., 259 Illinois Appellate 346; Hartzel vs. Maryland Casualty Company 163 Illinois Appellate 221).'

The judgment of the Circuit Court of Henry County is reversed and the cause remanded with directions to the Circuit Court of Henry County to overrule the plaintiff's demurrer to the defendant's pleas of limitation to the fourth, fifth, sixth and seventh additional counts.'

REVERSED AND REMANDED WITH DIRECTIONS.'

additional count, did not occur within two years prior to the
filing of said additional count. In passing upon this question
the court said: "The time when the count was
filed with all the terms of the policy. The additional count
did not over all countenance with the condition of the policy.

A but relied upon a waiver of certain of those conditions.
different cause of action was stated by it - one which could
be availed of only when amount within two years after the date
of the loss. (United Nat. Bank v. Chicago, 100 Ill. 2d 100)
The court said: "The time when the count was
filed with all the terms of the policy. The additional count
did not over all countenance with the condition of the policy.

Illinois 212." In the instant case the court, fifth, sixth and seventh

causes of action accrued and stated content of action which could
be presented only if brought within the twelve months limitation
period and such counts being filed after the expiration of that
period are, under the terms and conditions of the contract of
insurance and under the issues as herein attempted to be made
up, barred by the limitation therein contained.

It follows, therefore, that the court was in error in
the plaintiff's demand for the defendant's loss of limitation
as to such counts. (Tribble v. Sherman & White, Inc., 232
Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

The judgment of the Circuit Court of Henry County is reversed
and the cause remanded with directions to the Circuit Court of
Henry County to overrule the plaintiff's counter to the defendant's
plea of limitation to the fourth, fifth, sixth and seventh
causes of action.

STATE OF ILLINOIS,

} ss.

SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

1067
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 627

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 1 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A.D. 1932

Pleasant R. McIntosh,

appellee

vs.

Joseph M. Bosenbury,

appellant

Appeal from the County Court

of Peoria County

Baldwin, J:

This suit was originally brought before a Justice of the Peace of Peoria County, by the appellee, to recover damages occasioned by an automobile accident alleged to have occurred on May 9th, 1929 at the intersection of Bourland Avenue and Russell Street in the City of Peoria.

The cause was appealed from that court to the County Court of Peoria County where trial was had by jury resulting in a verdict in favor of the appellee. This appeal is prosecuted to reverse the judgment entered thereon.

The evidence presented in this case is not voluminous and shows that the automobile of the appellee was being driven in a southerly direction on Bourland Avenue and that the automobile of the appellant was being driven in an easterly direction upon Russell Street in the City of Peoria. At the intersection of Russell Street and Bourland Avenue a collision occurred between the automobiles of appellee and appellant.

The right front fender of appellee's automobile and the left front fender of appellant's automobile were damaged.

There is considerable variance between the testimony of the parties and some controversy as to the surrounding conditions and the rates of speed of the respective cars. There is no dispute as to the amount of damage to the appellee's car. Both the appellee and the appellant insist that the other was guilty of negligence

In the Appellate Court of Illinois

Second District

For Term, A.D. 1928

Franklin E. McInnis,

Appellant

Appel from the County Court

vs.

of Peoria County

Joseph M. Rosenbury,

Respondent

Defendant, v:

This writ was originally brought before a Justice of the Peace of Peoria County, by the appellee, to recover damages sustained by an automobile accident alleged to have occurred on May 26th, 1928 at the intersection of Highland Avenue and Russell Street in the City of Peoria, Illinois.

The cause was removed from that court to the County Court of Peoria County where trial was had by jury resulting in a verdict in favor of the appellee. This appeal is presented to reverse the judgment entered thereon.

The evidence presented in this case is not voluminous and shows that the automobile of the appellee was being driven in a southerly direction on Highland Avenue and that the automobile of the appellant was being driven in an easterly direction upon Russell Street in the City of Peoria. At the intersection of Russell Street and Highland Avenue a collision occurred between the automobiles of appellee and appellant.

The right front fender of appellee's automobile and the left front fender of appellant's automobile were damaged.

There is considerable variance between the testimony of the parties and some controversy as to the surrounding conditions and the exact speed of the respective cars. There is no dispute as to the amount of damage to the appellee's car. Both the appellee and the appellant insist that the other was guilty of negligence

which occasioned the accident.

There is considerable controversy concerning the rate of speed of the respective cars and as to the exact point in the intersection and the circumstances under which the cars collided. These questions, however, are questions of fact for the jury to determine and unless the verdict of the jury is manifestly against the weight of the testimony, this court will not reverse the findings. In this case we are not prepared to hold that the verdict of the jury is manifestly against the weight of the evidence. *Illinois Central Railroad Company vs. Gillis*, 68 Ill. 317, p. 319; *Calvert vs. Carpenter*, 96 Ill. 67; *Bradley vs. Palmer*, 193 Ill. 88.

Some complaint has been made as to the admissibility of evidence upon the trial of this cause and from an examination of the record it is possible that some error has occurred in the admission of testimony, but we find no reversible error in the record.

It is also earnestly urged by the appellant that the trial court committed reversible error in giving to the jury the plaintiff's (appellee) instruction No. 1 as follows: "The Court instructs the jury that a person approaching an intersection has the right to presume that another person also approaching said intersection is traveling at a reasonable and lawful rate of speed, unless there is actual notice to the contrary." It is sufficient to say that the appellant by his sixth instruction, told the jury substantially the same thing but perhaps in a more elaborate and extended form, and having committed the same error as that complained of, the appellant is in no position to make the objection urged.

In *Harney v. Sanitary District*, 260 Ill. 54 page 61 the court in passing upon a similar situation said "a party can not complain of a fault in an instruction where the instructions of the complaining party are open to the same criticism" and to the same effect is *Ankenbrandt v. Joachim*, 173 Ill. App. 158, page 161.

It may be observed, although it is the purpose of the law,

which accompanied the evidence.

There is considerable controversy concerning the rate of speed of the two vehicles and it is the duty of the jury to determine the circumstances under which the cars collided. These questions, however, are questions of fact for the jury to determine and unless the verdict of the jury is manifestly against the weight of the testimony, this court will not reverse the findings. In this case we are not prepared to hold that the verdict of the jury is manifestly against the weight of the evidence. Illinois Central Railroad Company v. Gillies, 32 Ill. 2d 317, 318; Calvert v. Carpenter, 32 Ill. 2d 317, 318; Railway v. Palmer, 188 Ill. 84.

Some complaint has been made as to the admissibility of evidence upon the trial of this case and from an examination of the record it is possible that some error has occurred in the admission of testimony, but we find no reversible error in the record.

It is also necessary to point up the significant facts of this case. The evidence is that the jury found in favor of the plaintiff. The court instructed the jury that a person representing an interested party has the right to procure that another person also representing said interested party at a reasonable and lawful rate of cost, unless there is actual notice to the contrary. It is sufficient to say that the plaintiff is not interested, and that the defendant is not interested. The court found that the plaintiff was not interested in the case and that the defendant was not interested in the case. The court found that the plaintiff was not interested in the case and that the defendant was not interested in the case.

In *Harvey v. Railway District*, 320 Ill. 2d 317, 318, the court is dealing upon a similar situation and the court is dealing upon a similar situation where the instructions of the court are open to the same criticism and to the same effect. *Harvey v. Railway District*, 320 Ill. 2d 317, 318, 319. It was observed, although it is the purpose of the law,

to give the driver on the right a preference in the use of the intersection, yet such right of preference does not relieve the one entitled to it from the duty of exercising due care to avoid injury to others. (Riddle vs. Mansager, 254 Ill. App. 68, page 73).

Finding no reversible error in this case the judgment of the County Court is affirmed.

Judgment Affirmed.

to give the driver on the right a preference in the use of the
intersection, and upon being so instructed, and believe the law
entitled him to take the way of proceeding due care to avoid injury
to others. (Exhibit A, Vol. III, page 10).

Further, no reversible error in this case was judgment of the

court is affirmed.

Respectfully,
[Signature]

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

1077
began and held at Chicago, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. COTT, Presiding Justice.

Hon. FRED A. HOLIF, Justice.

Hon. JAMES I. GALLAGHER, Justice.

JURORS: L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 627

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 1 1932 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1932.

Arthur Rossi, Administrator of
the estate of Ethel Rossi, de-
ceased,

(Plaintiff) Plaintiff in Error,

vs.

William Youblis, Jr.,

(Defendant) Defendant in Error.

Writ of Error to
Circuit Court
Winnebago County.

BALDWIN, J:

On February 8th, 1931 Ethel Rossi was injured in an auto-
mobile accident and ultimately as a direct result therefrom,
on May 28th died.

Mrs. Rossi left surviving her husband and two children,
aged eleven and twelve years respectively.

Suit was filed in the Circuit Court of Winnebago County
by the plaintiff in error herein against the defendant in error
to recover damages resulting on account of the alleged wrongful
act, to the next of kin of said Ethel Rossi, deceased.

The original declaration consisted of two counts, one a
negligence count and one count charging wilful and wanton injury.

The defendant in error pleaded the general issue and trial
by jury was had in the Circuit Court of said County, resulting
in a verdict for the defendant in error. The plaintiff in error
then presented his motion to set aside the verdict and for a new
trial but this motion was overruled by the court. He then pre-
sented his motion in arrest of judgment and this motion was also

IN THE
COURT OF COMMONS

May Term, A. D. 1900.

Plaintiff, Administrator of
the estate of Ethel Hossel, de-
ceased,

(Plaintiff) Plaintiff in error,

vs.

Wife of Hossel to
Ethel Hossel
Winnebago County.

William Hossel, Jr.,

(Defendant) Defendant in error.

Verdict:

On February 28th, 1900, Ethel Hossel was injured in an auto-

mobile accident and ultimately as a direct result thereof,

she died.

Mrs. Hossel left surviving her husband and two children,

aged eleven and twelve years respectively.

Suit was filed in the Circuit Court of Winnebago County

by the plaintiff in error herein against the defendant in error

to recover damages resulting on account of the alleged wrongful

act, to the next of kin or said Ethel Hossel, deceased.

The original declaration consisted of two counts, one a

negligence count and one count charging willful and wanton injury.

The defendant in error pleaded the general issue and trial

jury was had in the Circuit Court of said County, resulting

in a verdict for the defendant in error. The plaintiff in error

then presented his motion to set aside the verdict and for a new

trial but this motion was overruled by the court. He then pre-

sented his motion in arrest of judgment and this motion was also

overruled by the court. Judgment was entered upon the verdict of the jury in favor of the defendant in error and against the plaintiff in error for costs. It is to reverse this judgment that this writ of error is prosecuted.

The facts in the case are substantially as follows: On the evening of the injury Ethel Rossi and one Dorothy Berry were taken to a dance hall by one Tony Vince, who operates a taxi cab in Rockford, Illinois, where they remained unescorted until about midnight. After the conclusion of the dance Mr. Vince requested the defendant in error to take these young women to his garage, where he kept his taxi cab, and stated that he would be there shortly. The young women were seated in the front seat of the car with the defendant in error and were taken to the taxi cab garage where they awaited the arrival of Mr. Vince. After waiting for a time the defendant in error turned around and started back to the business portion of the town to search for Mr. Vince. Upon their return they met him and again turned around and started to the Vince Garage, driving South upon South Main Street in Rockford. The street was covered, in part at least, with snow and ice and the defendant in error drove his car over such street at a rate estimated by various witnesses of from thirty to fifty miles per hour.

Testimony is also presented that both of the young women requested the defendant in error to drive more slowly but that he failed to do so. In attempting to pass another car his automobile slipped or skidded upon the icy pavement off of the roadway and over the bank on the east side of the highway and fell a distance of thirty to forty feet below the level of the road. Ethel Rossi suffered a broken back, which resulted in paralysis and eventually caused her death on May 28th, 1931.

overruled by the court. Judgment was entered upon the verdict of the jury in favor of the defendant in error and against the plaintiff in error for costs. It is to reverse this judgment that this writ of error is presented.

The facts in the case are substantially as follows: On the evening of the injury Ethel Rossi and one Dorothy Henry were taken to a dance hall by one Tony Vines, who operated a taxi cab in Rockford, Illinois, where they remained unassorted until about midnight. After the conclusion of the dance Mr. Vines requested the defendant in error to take them home and to his garage, where he kept his taxi cab, and stated that he would be there shortly. The young women were seated in the front seat of the car with the defendant in error and were taken to the taxi cab garage where they awaited the arrival of Mr. Vines. After waiting for a time the defendant in error turned around and stated beside the business portion of the town to search for Mr. Vines. Upon their return they met him and again turned around and started to the Vines Garage, driving south upon South Main Street in Rockford. The street was covered in part at least, with snow and ice and the defendant in error drove his car over such street at a rate estimated by various witnesses of from thirty to fifty miles per hour. Testimony is also presented that both of the young women requested the defendant in error to drive more slowly but that he failed to do so. In attempting to pass another car his automobile slipped or skidded upon the icy pavement off of the roadway and over the bank on the east side of the highway and fell a distance of thirty to forty feet below the level of the road. Ethel Rossi suffered a broken back, which resulted in paralysis and eventually caused her death on May 15, 1931.

At the close of the trial the plaintiff in error withdrew from the consideration of the jury his count of negligence and the cause proceeded solely upon the count in the declaration charging wilful and wanton injury with the result as above set forth.

Plaintiff in error tendered to the court the following instruction: "The court further instructs the jury that if they shall find from all the evidence in this case that the defendant, William Youblis, Jr., did, just prior to and at the time of the accident, operate his automobile wilfully, wantonly and maliciously and with conscious disregard, if any, for the consequences of his actions, then you may not take into consideration the question of contributory negligence on the part of plaintiff's intestate." This instruction was refused by the court and such refusal is assigned as error by the plaintiff in error herein.

This cause, as indicated, proceeded solely upon the count of wilful and wanton conduct and courts of this State have frequently held that contributory negligence does not relieve a defendant from liability for wilful or wanton injury. (Walldren Express Company vs. Krug 291 Illinois 472).

In *Rosé vs Noble & Company* 316 Illinois 357 page 373 the court said: "The defense of contributory negligence is based on the common law doctrine that there can be no recovery for an injury caused by the common, mutual, concurring negligence of both parties, regardless of the degree in which their negligence, respectively, contributed to the injury. The defense does not apply to injuries wilfully or wantonly inflicted." (Walldren Express Company vs. Krug 291 Illinois 472; Meidenreich vs. Bremner 260 Illinois 439; Illinois Central Railroad Company vs Leiner 202 Illinois 624).

This is necessarily so for the reason that negligence is predicated upon carelessness, thoughtlessness and heedlessness,

while willfulness and wantonness are predicated upon an intentional or deliberate act or an intentional disregard of a known duty to the safety of person or property of another and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequence. (Walldren Express Company vs. Krug, supra). Thus it is seen that the defense of contributory negligence has no application whatever in a suit predicated solely upon wilful and wanton injury.

It necessarily follows in this case that any negligence on the part of the deceased was not a matter to be considered by the jury in arriving at their verdict and it was error for the court to refuse the instruction tendered. We have examined the record and we find no other given instruction which contained or announced the rule laid down by this instruction.

There are other questions presented in this case by the plaintiff in error; but in view of the fact that this case must be reversed for error in refusing the instruction above referred to, we have not deemed it necessary to consider all of the reasons assigned and argued by plaintiff in error.

The judgment of the Circuit Court of Winnebago County is reversed and the cause remanded.

REVERSED AND REMANDED.

the witnesses and respondents are questioned as to the
national or political and as to religious or political views of a
person with the object of getting the truth out of him.
In the course of this the life, person and property
of others, such as the wife and children, are also
concerned. (Witnesses express concern for their family.)
It is seen that the claims of religious activities are an
important factor in this investigation which upon being
made become false.

It is necessarily follows in this case that the
the fact of the persons who are not a matter to be considered
by the fact is that the person who is not a matter to be
the court to return the investigation conducted. The facts obtained
the court and we find no other matter concerning which
was known the fact that the person who is not a matter to be

There are three questions presented in this case by the
Court. It is asked: Was it true that the person who is not a
matter to be considered by the court is not a matter to be
considered by the court? It is asked: Is the person who is not a
matter to be considered by the court a matter to be considered
by the court? It is asked: Is the person who is not a matter to
be considered by the court a matter to be considered by the court?

Witnesses and Respondents.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause.

of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

1087
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:
Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 627³

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 8 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

May Term, A. D. 1932

BALDWIN, J.

This suit was originally brought by Rose Genschow and Charles Genschow, appellees, hereinafter designate as complainants, against the First Trust Joint Stock Land Bank of Chicago, appellant,

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hereinafter designated as defendant, and prayed for cancellation of a note for the sum of Seven Thousand Dollars (\$7,000.00) and a mortgage securing the same upon the land of complainants.

The facts were that the defendant had made a loan to the complainants for the sum of Seven Thousand Dollars (\$7,000.00), had received the note therefor and mortgage to secure same and had, in accordance with directions received by it, deposited the said sum of Seven Thousand Dollars (\$7,000.00) with the First National Bank of Chicago to the credit of the Bank of Chebanse and notified such bank of its action. The cashier of the Bank of Chebanse, without the knowledge or consent of the complainants or the defendant, transferred such moneys to the Bank of Chebanse and placed the same to the credit of Charles Genschow. The next day the Bank of Chebanse failed.

The defendant filed its answer detailing the deposit of the Seven Thousand Dollars (\$7,000.00) for the specific purpose of the loan and its order and direction to the Bank of Chebanse and alleged that the fund so transferred and in the hands of the said bank constituted a trust fund held by the said bank for the benefit of the complainants if they desired or for the benefit of the defendant if the note and mortgage were cancelled.

The defendant also filed its cross bill herein and in addition to the complainant made the Bank of Chebanse and its receiver defendants thereto and set forth the various acts concerning such moneys and requested that the fund in the hands of the receiver and the bank be declared a trust fund.

The Circuit Court of Iroquois County in such proceeding entered a decree cancelling the note and mortgage of the complainants and dismissed the cross bill of defendant Land Bank for want of equity. The defendant appealed from such decree to this

court. On August 20th, 1931 this court rendered a decision sustaining the decree of the Circuit Court insofar as it cancelled the said note and mortgage but reversed the decree insofar as it dismissed the cross bill of complainant and further found that the Seven Thousand Dollars (\$7,000.00) in question was a trust fund and having been traced directly into the hands of the receiver for the said bank, the cross complainant was entitled to a decree establishing the said fund as a trust fund and directing its payment by the receiver to such defendant.

From this finding, sustaining the said decree in part and reversing it in part, the receiver filed his petition for a writ of certiorari in the Supreme Court of this State but at the December Term 1931 the Supreme Court refused to grant such petition. The cause was redocketed and the mandate and opinion of the Appellate Court filed in the Circuit Court. The defendant then filed its motion to redocket this cause and presented to the court a decree in accordance with the mandate and opinion of this court and moved the court to enter such decree. The receiver of such bank objected to the entry of the decree presented by defendant. Upon motion of the solicitor for the receiver the court refused to enter the decree so tendered by defendant but received and entered a decree tendered by receiver finding the fund in question to be a trust fund, but ordering the same to be paid by the receiver in due course of administration of the receivership of the Bank of Chebanse. From this decree the defendant has prosecuted this second appeal.

The law is well established that when the mandate of the Appellate Court directs the entry of a decree in accordance with the views of the Court expressed in its opinion, the trial court must look to the opinion to ascertain the views expressed and must

conform its action to the directions given and must enter a decree in accordance therewith. (People vs DeYoung 298 Ill. 380; Fisher vs Burks 285 Ill. 290; Prentice vs Crage 240 Ill. 250). And when such cause is remanded with directions to enter a decree, the court has no jurisdiction in the matter but its duty is to enter the decree in accordance with such direction. (People vs DeYoung 298 Ill. 380; People vs Scanlan 294 Ill. 64; Fisher vs Burks, supra).

Upon the redocketing of this cause in the Circuit Court and the filing of the mandate of this court therein, there remained but one duty for the Circuit Court to perform and that was to obey the direction of such mandate and enter a decree in this cause strictly in accordance therewith. (Fisher vs Burks 285 Ill. 290). It had no other duty and no discretion in the matter. The Circuit Court, therefore, was without power or authority to enquire into the correctness of the decision of the Appellate Court. (People vs Scanlan 294 Ill. 64).

The order and decree of the Circuit Court of Iroquois County entered herein is reversed and this cause is remanded to the said Circuit Court of Iroquois County with directions to enter a decree in this case in accordance with the original mandate of this court.

REVERSED AND REMANDED WITH DIRECTIONS.

1. The first step in the process of identifying a potential threat to national security is to determine whether the information is classified. If the information is classified, the next step is to determine whether the information is a threat to national security. If the information is a threat to national security, the next step is to determine whether the information is a threat to the national security of the United States. If the information is a threat to the national security of the United States, the next step is to determine whether the information is a threat to the national security of the United States.

There is no justification in the matter but the Court is to be

It is not clear how the situation of the world has changed since the time of the writing of this book. The world has changed a great deal since the time of the writing of this book. The world has changed a great deal since the time of the writing of this book.

1997. The National Science Foundation, Washington, DC.

1998, 1999). The results are consistent with the findings of the previous studies.

cause in this case is consistent with the original results of

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

1097
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:
Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 627⁴

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 8 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
Second District
OCTOBER TERM A. D. 1931

M. EBERT and F. M. EBERT,
doing business as M. EBERT
COMPANY,

Appellees,

-VS-

PREMIER MALT PRODUCTS COMPANY,

Appellant.

- - - - -

PREMIER MALT PRODUCTS COMPANY,

Appellant,

-VS-

M. EBERT and F. M. EBERT,
doing business as M. EBERT
COMPANY,

Appellees.

APPEAL FROM THE
CIRCUIT COURT OF
PEORIA COUNTY.

Jett, J.

M. Ebert and F. M. Ebert, doing business as M.

Ebert Company, appellees, filed their bill against Premier Malt Products Company, appellant, to establish and foreclose a mechanic's lien for material furnished and labor expended in the drilling of two twelve inch wells and furnishing and erecting two deep well pumps, complete with castings, discharge pipes, pump rods, motors and everything necessary to make a complete operating unit, in accordance with a contract entered into between appellees and appellant, consisting of a written proposal of appellees and the written acceptance thereof by appellant, and the written modification thereof as to the type of motors to be installed.

IN THE
COURT OF COMMONS OF ILLINOIS
JAMES C. HARRIS
CORPORATE TRUST A. D. 1901

... and T. F. HARRIS,
... as T. F. HARRIS,
...
Appellants,
-VS-
...
Appellees.
-VS-
...
Appellants,
-VS-
...
Appellees.

M. HARRIS and T. F. HARRIS, being business as is.
... Company, appellants, which shall appear as parties to the
... Company, appellants, to establish and maintain a business
... for material furnished and labor expended in the building of
... twelve inch well and erecting two deep well
... complete with casing, discharge pipes, pump rods, motors
... necessary to make a complete operating unit, in
... with a contract entered into between appellants and the
... consisting of a written proposal of appellants and the
... received thereof by appellees, and the written notification
... type of motor to be installed.

A hearing was had and a decree entered in favor of appellees in the sum of \$2585.33, together with interest at the rate of 5% per annum from July 8th, 1926. It is from the decree that appellant prosecutes this appeal.

Appellees allege in their bill that they are engaged in the business of well drilling and installing heavy pumps and that on, to-wit: February 27, 1925, the appellant Premier Malt Products Company, a corporation, applied to appellees to construct two deep wells and install certain pumps and other equipment to be used in connection with the factory of the appellant, and that appellees submitted to appellant a proposal in writing for the doing of said work, and said appellant accepted in writing the proposition of appellees by submitting to them a letter accepting said written proposal theretofore submitted to said appellants by appellees; that immediately thereafter and in compliance with the terms of said contract, appellees commenced work. Appellees charge that they did, in compliance with the contract, drill two twelve inch wells and furnished two No. 4-L. A. D. Cook Deep-well pumps, complete with castings, discharge pipe, pump rods, motors, and in fact everything necessary to make the same a complete operating unit, and completed their contract and did in all respects comply with the terms of said contract and the specifications and drawings by them required to be performed; that prior to the beginning of the work on said contract appellants employed appellees to perform some labor upon their old wells on the premises on which the two wells were to be sunk. It is further alleged by appellees that in accordance with the condition of their said contract they completed their part of said contract according to the conditions and terms thereof, which said work under said contract was completed on, to-wit; April 27th, 1926; that after the completion of the work on said contract on, to-wit: April 27th, 1926, the appellant company accepted the same and took possession thereof and have ever since used said wells and machinery as part

A hearing was had and a decree entered in favor of appellants
sum of \$2500.00, together with interest at the rate of 6% per
annum from July 28th, 1926. It is from the decree that appellants
present this appeal.

Appellants allege in their bill that they are engaged in
business of well drilling and in selling heavy machinery and that in
February 27, 1925, the defendant, appellant, left appellant's

company, a corporation, entitled to appellants to construct two deep
wells and install certain pumps and other equipment to be used in
connection with the factory of the appellants, and that appellants sub-
mitted to appellants a proposal in writing for the doing of said work,
and said appellants accepted in writing the proposition of appellants
submitting to them a letter accepting said written proposal, there-
upon submitted to said appellants by appellants; that immediately

thereafter and in compliance with the terms of said contract,
appellants commenced work. Appellants allege that they did, in com-
pliance with the contract, drill two twelve inch wells and furnished
No. 4-D. A. H. Cook Deep-Well pumps, complete with cast-iron
discharge pipe, pump rods, motors, and in fact everything necessary
to make the same a complete operating unit, and complete their con-
tract and did in all respects comply with the terms of said contract
the specifications and drawings by them required to be furnished;
prior to the beginning of the work on said contract appellants

employed appellants to perform some minor work on their wells on
premises on which the two wells were to be sunk. It is further
alleged by appellants that in accordance with the condition of their
contract they completed their part of said contract consisting
of said wells and pumps thereon, and that said wells were
located and completed on or about April 27th, 1926, and that
completion of the work on said contract on, to-wit: April 27th,

the appellants company accepted the same and took possession
thereof and have since used said wells and pumps in their

of their plant; that under the terms and conditions of the contract appellees were to be paid in cash when the wells were completed at a stipulated price of \$17,083.00, with additional payments if the wells were drilled deeper than 325 feet and it was also specified that appellees were to receive an additional sum on account of a difference in motors, all of which items constitute a part of the original contract; that appellees did do additional work after the completion of said contract in connection with the wells in the sum of \$317.75 and that they furnished additional pipes and did further work to the amount of \$58.90 and \$112.75, making a total due them under the contract of \$18,651.30; that they gave appellant credit for the payment of \$15,500, leaving a balance of \$3151.30 with interest at 5% from April 27th, 1926.

Appellant filed an answer to the original bill, denying all of the material allegations thereof, and also filed a cross-bill in which appellant set up the fact that due to the careless and unskillful manner in which appellees, (the defendants in the cross-bill) installed parts of said pumps and equipment, and due to the careless and unskillful manner in which appellees attempted to operate said pumps and equipment, and due to the repairs and changes which appellant was compelled to and did make to said pumps and equipment, the completion of the work provided to be done by appellees in and by said contract was without fault on the part of appellant delayed for an unreasonable length of time, and appellant was deprived of the use of one of said wells and the pump and equipment appertaining to it for an unreasonable length of time, to-wit: for a period of 60 days and appellant was likewise deprived of the use of the other of said wells and the pump and equipment appertaining to it for an unreasonable length of time, to-wit: for a period of 70 days, during all of which times appellant was compelled to and did expend a large sum of money, to-wit: the sum of \$3,000 for the

...that under the terms of the contract...
...the wells were to be paid in cash when the wells were...
...at a stipulated price of \$14,000.00, with additional payments...
...the wells were drilled deeper than 325 feet and it was also agreed...
...that appellees were to receive an additional sum in amount of...
...in money, all of which items constituted a part of the...
...contract; that appellees did do additional work after the...
...of said contract in connection with the wells in the amount...
...and that they furnished additional pipes and did not...
...to the amount of \$38.00 and \$12.75, making a total of \$50.75...
...the contract of \$18,000.00; that they gave appellees credit...
...the payment of \$18,000, leaving a balance of \$32.75 with...
...cost of \$12,000.00, that...

Appellant filed an answer to the original bill, denying...
...of the material allegations thereof, and also filed a cross-
...in which appellant set up the fact that due to the repairs and...
...manner in which appellees, (the defendants in the cross-
...installed parts of said pump and equipment, and due to the...
...and unlawful manner in which appellees attempted to...
...said pump and equipment, and due to the repairs and changes...
...was compelled to and did make to said pump and...
...the completion of the work provided to be done by appellees...
...and by said contract was without fault on the part of appellant...
...for an unreasonable length of time, and appellant was de-
...of the use of said wells and the pump and equipment...
...to it for an unreasonable length of time, to-wit: for a...
...of 40 days and appellant was likewise deprived of the use of...
...of said wells and the pump and equipment pertaining to...
...for an unreasonable length of time, to-wit: for a period of 70...
...all of which times appellant was compelled to and did...
...a large sum of money, to-wit: the sum of \$5,000 for the

purchase of water necessary in the operation of its said factory on said premises.

It was further charged in said cross-bill by the appellant that appellees had been overpaid and were indebted to the appellant.

Appellees filed an answer to the cross-bill and the cause was referred to the master to take the proof and report his conclusions thereon. The master made his report and found with appellees on all questions involved except as to their claim for labor in the sum of \$317.75 expended in repairing the pumps after their breakdown. The total amount due appellees as shown by the report of the master and the decree entered thereon is \$2585.53, together with interest thereon at the rate of 5% per annum from July 8th, 1926, as previously indicated.

It is the contention of appellant that in the statement of the account between the parties it should, in addition to the sums credited to it in the statement of the accounts by the master, be credited with the sums paid by appellant for parts and equipment purchased for the rebuilding and repair of the pumps and transportation charges on said parts and equipment amounting in the aggregate to \$1872.53, and that appellant should also be credited in that statement of account for the sums paid for water during the periods above mentioned, and that when such credits are allowed to appellant the account shows appellees to be indebted to appellant and appellant should have a decree in its favor as prayed for in its cross-bill.

The record discloses appellees had been engaged in the business of sinking wells for a number of years prior to February 1925; that a representative of the A. D. Cook Company, a manufacturer of deepwell pumps informed appellees that appellant was considering some wells, and after that W. Elbert, one of appellees, went to the factory of appellant and conferred with some of its officers with reference to the sinking of wells. Pursuant to such

...of water necessary in the operation of its said factory on

its premises.

It was further alleged in said statement by Mr.

...that the defendant had been negligent in not

applying.

Applicant filed an answer to the statement by the

...referred to the water to take the report and without his con-

...thereon. The master made his report and found with

...as all property was destroyed except as to the

...in the sum of \$10,000, as reported in the

...The total amount due applicant as a result of the

...of the master and the degree entered therein is \$10,000.

...with the master at the rate of \$10,000 per

...year, 1901, as per said statement.

It is the contention of applicant that in the statement

the account between the parties is \$10,000, in addition to the sum

...to it in the statement of the account by the master, be

...with the same rate of applicant for the same

...for the defendant and that of the master and

...as a result of said report and statement in the

...1901, and that applicant should also be entitled to that

...of account for the same time for water used in the

...and that same should also be allowed to applicant

...account of applicant as he claimed in applicant's

...in the master's bill.

The record discloses applicant and was engaged in the

...of sinking wells for a number of years prior to February

...that a representative of the A. C. Cook Company, a manu-

...of Deepwell Works informed applicant that applicant was

...wells, and after that L. E. West, one of the

...of the factory of applicant and connected with some of its

...to the sinking of wells. In fact to such

conference appellees prepared and sent to appellant a proposal on February 27th, 1925, and subsequently in August or September of said year another meeting was had between appellees and one of the officers of appellant with regard to doing work on some old wells upon the premises of appellant. Appellees were employed to attempt to pump an old well to get water and analyze it and see how much water the well would pump. Appellees worked on the old well but were unable to pump it, and after that appellant company inquired about putting in a test well. Arrangements were made as to the compensation for this and the test well was drilled, a pump put in and it was pumped for a period of about a week. After appellant by its officers had inspected the operation of the test well and analyzed the water, appellant sent the acceptance letters of October 12th and 14th, 1926, heretofore referred to. A few days thereafter appellees moved their equipment to the premises of appellant for the purpose of putting down the permanent wells. One of the wells was drilled to a depth of 335 1/2 feet and was completed during the latter part of December 1925. A 4 L A. D. Cook, 18-inch double stroke pump was installed, and the pump was connected with a traction engine of appellees with a 10-inch leather belt and this well was pumped three different days. It produced 200 to 250 gallons of water per minute. The officers of the appellant company were present on various occasions and saw the pump operating. The machinery was then moved away so that appellant could build a pump house over well number 1. Well number 2 was started in January 1926, on the first of February 1926. It appears that some difficulty was encountered and the well was abandoned and a new one started near the original location of well number 2. Well number 2 was drilled to a depth of 532 feet. After a pipe and screen were installed a 4 L A. D. Cook pump was set up. Before the pump was put on the permanent foundation it was operated two or three different times. The officers

[illegible]

of appellant were present and observed the operation of the pump/ This well pumped about 235 gallons per minute. After the machinery was moved away number 2 pump was put upon a permanent foundation and the appellant was informed that number 2 well was completed.

It appears that some repairs were required to be made on some of the pumps. The repairs were ordered and made by appellant. It is the contention of appellees that when the pumps were completed and turned over to appellant they were in proper operating condition; that the breakdown was caused by lack of water and not by anything appellees did or failed to do in the performance of their contract.

The record further discloses that after the wells had been completed appellant made a payment on the contract of \$5,000. The record further shows that one F. A. Singer, an officer of appellant company, testified that he had known since the first or middle of April 1926 that number 1 well was not satisfactory and had known the same as to number 2 well when it was turned over the latter part of April or early May, 1926. Notwithstanding its being in possession of such information, \$5,000 was paid as heretofore dated and on June 26th, 1926, after all of the work had been performed by appellees, an additional payment of \$2,900 was made on the contract.

Appellees deny there was any contract aside from the written contract and charge that they did the work in strict compliance with that contract and there were no implied warranties that the wells would produce any certain amount of water or that the pumps were warranted in any particular manner.

We have examined the record and the contentions of the respective parties and we are of the opinion that the whole contract between appellees and appellant was contained in the offer and acceptance of the parties and the modification of the same by the writing of the appellant authorizing the change in the type of motors and that unless the contract itself contains warranties there is no

...the pump was started and the water was pumped out of the well. After the machinery was pumped away number 2 pump was put upon a permanent foundation and a pump was installed and water was pumped out of the well.

It appears that some repairs were required to be made on one of the pumps. The repairs were ordered and made by the contractor. The contractor of the pump was the same who was contracted to build the pump. It turned over to applicant they were in proper working condition; at the breakdown was caused by lack of water and not by anything else. The contractor did not fail to do in the performance of his contract.

THE SECOND PUMP WAS BUILT AND THE FIRST PUMP WAS REPAIRED. The applicant made a payment on the contract of \$5,000. The first pump was built and the second pump was repaired. The first pump was built and the second pump was repaired.

It is noted that number 1 well was not satisfactory and had been abandoned as to number 2 well when it was turned over to the contractor. In April or early May, 1928, notwithstanding the delay in construction of such information, \$5,000 was paid as balance due by the contractor, after all of the work had been performed by the contractor. An additional payment of \$5,000 was made on the contract.

It is noted that the first pump was not satisfactory and had been abandoned. The second pump was built and the first pump was repaired. The first pump was built and the second pump was repaired.

We have examined the record and the contents of the various parties and we are of the opinion that the whole contract was properly performed and that the contractor was entitled to the payment of the contract. The contractor was entitled to the payment of the contract. The contractor was entitled to the payment of the contract.

implied warranty that would be binding upon appellees or appellant. The written proposal of appellees to appellant dated February 27th, 1925, the written acceptance of appellant under date of October 12th, 1925, and the modification of written proposal under date of October 14th, 1925, constitute the contract in this case between appellant and appellees, and an examination of these will show that there was no warranty of any kind on the part of appellees of the pumps or equipment furnished by them to appellant. This being true, no warranty is implied. The rule is that when parties have put their contract and agreements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such agreement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing and all oral testimony of previous conversations between the parties or of conversations or declarations at the time when it was completed or afterwards, is eliminated.

In *Fuchs & Lang Co. vs Kittredge & Co.*, 242 Ill. 88, it was held that not only was all oral testimony of previous conversations or declarations of the parties properly excluded, but that conversations and declarations at the time when the contract was completed or afterwards were also not properly admissible. The rights of the parties in this cause are governed solely by the letters heretofore referred to and placing the most favorable construction upon these letters in favor of the appellant, no warranty of any kind or character can be deduced or implied therefrom.

Prior to the entering into of the contract by the respective parties, appellant, through its officers, made an investigation as to the A. D. Cook Company and its products, and satisfied itself as to the responsibility of this company and the quality of its products. In addition to this the pumps and equipment

...the written proposal of appellant under date of October 1934, and the modification of written proposal under date of October 1935, constitute the contract in this case between appellant and appellee, and an examination of these will show that there was warranty of any kind on the part of appellee of the goods or present furnished by them to appellee. This being true, no warranty is implied. The rule is that when parties have not their contract and agreements into writing in such terms as to make a legal obligation, without any uncertainty as to the object or extent of agreement, it is conclusively presumed that the whole understanding was the parties and the extent and manner of their understanding was based to writing and all oral testimony of previous conversations between the parties or of conversations or declarations at the time it was completed or afterwards, is eliminated.

In *Woods & Lang Co. vs. Hittmeyer*, 100, 225, 111, 20, we held that not only was all oral testimony of previous conversations or declarations of the parties properly excluded, but at conversations and declarations at the time when the contract was completed or afterwards were also not properly admissible. The rights of the parties in this case are governed solely by the terms hereafter referred to and placing the most favorable construction upon these letters in favor of the appellant, no warranty at all on character can be deduced or implied therefrom.

...the contract of the parties is the contract made as in-... parties, appellant, through its officers, made as in-... as to the A. D. Cook Company and its products, and... itself as to the responsibility of this company and the... of its products. In addition to these the same and contract

furnished by appellees in accordance with their proposal of February 27th, 1925, are described by a patent trade or manufacturer's name, and purchased by appellees under that name. Some of the equipment was furnished by appellant but it was also designated by patent trade or manufacturer's name. This being true, there could be no implied warranty of any kind of the articles or equipment purchased under such names, nor is there any implied warranty that such equipment was fit for any particular purpose. This is especially true in view of the fact that appellant made its own investigation to determine the quality of the equipment specified in appellees' written proposal. The record discloses that appellees furnished the equipment they agreed to furnish and fully complied with their contract.

In *Fuchs & Lang Co. vs Kittredge & Co.*, supra, at page 97 the court, among other things, said: "in a contract for the sale of an article under its patent or other trade name, there is an undertaking that the article shall be of the kind ordered but not that it shall be fit for any particular purpose. If the buyer gets what he bargained for, there is no implied warranty though it does not answer its purpose."

The record discloses, therefore, that appellant received what it purchased and cannot now raise an implied warranty as to quality or fitness for any particular purpose as it has attempted to do. By paying upon the contract appellant waived any claim that there was a breach of warranty. The only warranty that appears in the proposal number two of appellees which was accepted by appellant and became part of the contract between the parties is, "the above two pumps are efficient to deliver 500 gallons per minute to surface." The only statement in the contract as to capacity of the pumps is this one. There is no evidence the pumps did not measure up to that capacity. There is no warranty or guaranty of any kind that water would be obtained or that any certain amount

... by appeal in accordance with their proposal on
January 27th, 1955, are described by a patent under appellant's
name, and purchased by appellee under that name. Some of the
equipment was furnished by appellant but it was also furnished by
other firms or manufacturers' names. This being true, there
could be no implied warranty of any kind of the articles or of the
equipment under such names, nor is there any implied warranty
of such equipment was fit for any particular purpose. This is
especially true in view of the fact that appellant made the own
investigation to determine the quality of the equipment specified
in appellee's written proposal. The record discloses that appellee
furnished the equipment they agreed to furnish and fully satisfied
to their contract.

In 1954 a fact is, by appellee's name, as well as by
the name of the firm which supplied the equipment. The fact is
that an official record is kept of all equipment which is
furnished and the name of the firm which supplied the
equipment is noted in the record. If the fact
is that the equipment is not of the quality specified, it
is not the responsibility of the firm which supplied the
equipment.

The record discloses, therefore, that appellee received
the equipment and cannot now raise an implied warranty as to
its quality or fitness for any particular purpose as it has attempted
to do. By paying upon the contract appellee waived any claim
and there was a breach of warranty. The only warranty that appellee

... the proposal number two of appellee which was specified by
appellee and became part of the contract between the parties is,
"to supply two pumps and efficient to deliver 500 gallons per minute
...". The only statement in the contract as to capacity of
the pumps is that they are to deliver 500 gallons per minute
... up to that capacity. There is no warranty or quantity of
kind that water would be obtained or that any certain amount

of water would be available. There is nothing in the letters of appellant in which it accepted this proposal of the appellees that there was any intimation on its part that it expected appellees to guarantee water or the amount thereof.

In *Finch vs McIntosh*, 171 Ill. App. 120, at pages 121-122, the Court said: "In a contract to dig or bore a well there is no implied warranty that water will be obtained, but only that the work will be done in a workmanlike manner." The proof shows there was no test made to determine the quantity of water that could be produced from a given well. The test well put down by appellees at the request of appellant was for the sole purpose of determining the "quality of the water."

The weight of the evidence shows appellant relied upon its own judgment as to the quality of the water that might be obtained, and indicated the place where the wells were to be put down. The only test made as to the quantity of water was made by appellant in its own well constructed by it. Appellees had nothing whatever to do with the measuring of the water, and after appellant had observed the flow of water from the test well for some considerable length of time it directed appellees to go ahead with the work under the contract. The evidence shows that after the wells were put down and tried out, and it was definitely determined that the water was not sufficient and not in the quality anticipated by appellant, appellant waived the right to raise the question of non-performance by making payments on the contract, and by promising to pay the balance due on the contract. In this connection the record shows that on April 29th, 1926, appellant paid to appellees by check \$5,000 and in the voucher under column "details of payment" recited the following: "To apply on account of new deep wells." Appellant paid \$3,000 by check under date of February 23rd, 1926; \$5,000 was paid by check January 7th, 1926, and \$2,500 under date of June 26th, 1926, and it is shown by the evidence, that these checks were

There is nothing in the letters of appellant in which it asserted this proposal of the appellees that there was any indication on its part that it expected appellees to guarantee water on the amount thereof.

In *Winn v. McIntosh*, 171 Ill. App. 120, 22 pages 121-122, the Court said: "In a contract to dig or bore a well there is no implied warranty that water will be obtained, but only that work will be done in a workmanlike manner." The Court shows that was no test made to determine the quantity of water that could be obtained from a given well. The Court said that the quantity of the water was for the sole purpose of determining the quality of the water."

The weight of the evidence shows appellant waived its own judgment as to the quality of the water that might be obtained, and indicated the place where the wells were to be dug, and the flow of water from the test well for some considerable length of time it directed appellees to go ahead with the work under

the evidence shows that after the wells were dug and tried out, and it was definitely determined that the water was not sufficient and not in the quality anticipated by appellant, appellant waived the right to raise the question of non-performance.

By making payments on the contract, and by promising to pay the balance due on the contract. In this connection the record shows that on April 25th, 1925, appellant paid to appellees by check \$1,000 and in the voucher under column "details of payments" recited "To pay on account of new deep wells." A receipt for \$1,000 by appellees dated at Chicago, Ill., April 25, 1925, was

filed in the cause January 7th, 1926, and \$2,500 under date of June 1st, 1926, and it is shown by the evidence that the balance of the

all given to appellees to apply on the contract and it cannot be denied that if there was any controversy or question in the mind of appellant's agents, these questions or controversies were waived by the giving of the check dated June 26th, 1926, because at that time all of the work had been done and both wells had proven inefficient as far as the quantity of water was concerned. The rule is, that under contracts of the character involved in this cause a literal compliance with the specifications is not necessary to a recovery by the contractor. A substantial performance in good faith is sufficient. It appears to us appellees performed the terms of the agreement in a substantial manner and that it was not a result of their failure to comply which caused a failure in performance of the equipment installed by them but that such failure was due to a lack of water. It is shown appellees installed the identical equipment called for in their contract and the work performed by them was done in a workmanlike manner. This being true, the failure of the pumps to work is not chargeable to appellees. They were not guarantors of the quality or quantity of water.

It will be remembered that appellant made a change in the equipment proposed to be furnished by appellees in their letter of February 27th, 1925, in that it requested appellees to furnish two 50 horse power slip ring motors, instead of the motors specified in the proposal of appellees. There was no warranty by appellees that the motors requested by appellant would function or properly operate the pumps and we are of the opinion that appellant is estopped from complaining about whatever damage was caused or resulted on this account.

In *Erickson vs Ward*, 266 Ill. 259, the court held that here the owner makes changes in the plans and specifications after the letting of a contract for a building, such changes cannot be made the basis for a claim that the contractors failed to properly

It will be remembered that applicant was a change in equipment proposed to be furnished by applicant in the latter part of 1935, in which it requested applicant to furnish 30 horse power slip ring motors, instead of the motor specified in the proposal of applicant. There was no warranty by applicant that the motors requested by applicant would function as properly as the motors and we are of the opinion that applicant is entitled to recover from applicant whatever damage was caused or

perform the contract.

Appellant also questions the allowance of interest by the court on the claim of appellees. Under the Mechanic's Lien Law interest is allowable regardless of whether the account is disputed or not or liquidated or unliquidated and the court was warranted in allowing interest from July 8th, 1926, the day the contract was finally completed.

In conclusion, we have carefully examined the various suggestions of the appellant made by it with a view of reversing the order and decree entered in this cause. We are of the opinion that substantial justice has been done between the parties. The order and decree of the Circuit Court of Peoria County should be affirmed, which is accordingly done.

Decree affirmed.

THE COURT.

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THE COURT.

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THE COURT.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

170 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 628'

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 8 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS

Second District

FEBRUARY TERM A. D. 1938

General No. 8430

Agenda 7.

HJALMAR BURMAN,

Appellant,

-VS-

ROCKFORD PUBLIC SERVICE
COMPANY, a Corporation,

Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
WINNEBAGO COUNTY.

Jett, J.

Hjalmar Burman, appellant, hereinafter called plaintiff, brought this suit in the Circuit Court of Winnebago County against the Rockford Public Service Company, an Illinois corporation, appellee, and referred to as defendant hereafter, to recover damages for an injury he received by being struck by one of the cars of the defendant.

The declaration consists of two counts. The first count avers that on the 13th day of September, 1939, plaintiff was proceeding on foot in an easterly direction along a certain street or public thoroughfare in or near the City of Rockford, Illinois, known as Harrison Avenue, near the intersection of Ninth Street; that the defendant was possessed of and operated a certain line of street railway upon and along said Harrison Avenue and at the time and place aforesaid defendant possessed a certain street car operated and propelled by electricity upon the said street car line, which said car was then and there being run and operated in an easterly direction along the said line of railway by defendant through its agent or servant; that while so walking along and upon

IN THE
SUPREME COURT OF THE UNITED STATES
JANUARY TERM, 1908
SHEPHERD V. A. H. 1908

Plaintiff.

Defendant.

JOHN A. SHEPHERD
Plaintiff.

Appellant.

Appellee.

Appellee.

Whitney Brown, appellant, hereinbefore called
plaintiff, brought this suit in the Circuit Court at Chicago,
Illinois, against the Rockford Public Service Company, an Illinois
corporation, and referred to as defendant herein, for
recovery of damages for an injury he received by being struck by one
of the cars of the defendant.

The declaration consists of two counts. The first
count avers that on the 18th day of September, 1905, plaintiff was
standing on foot in an easterly direction along a certain street
in the city of Rockford, Illinois, near the intersection of Fifth Street
and Harrison Avenue, when the intersection of Fifth Street
and Harrison Avenue was possessed of and operated a certain line of
street railway upon and along said Harrison Avenue and at the time
a place above defendant possessed a certain street car
owned and propelled by electricity upon the said street car
and said car was being propelled in the said direction
easterly direction along the said line of street by defendant
when the said car struck and injured plaintiff.

said thoroughfare as aforesaid he was in the exercise of due care and caution for his own safety; that he was proceeding along a well defined and commonly used foot path near the said line of railway of defendant on Harrison Avenue; that near the intersection of Harrison Avenue and Ninth Street the said footpath intersected and crossed said line of railway of defendant by a well defined road over which the public had travelled for a considerable period of time with the knowledge and permission of defendant and its agents or servants and the use of which a considerable number of people had availed themselves; that appellant in following the said footpath on or near said line of railway of appellee was proceeding by the usual and customary route as aforesaid, to the intersection of Harrison Avenue and Ninth Street with the purpose then and there of boarding the said street car of the defendant as a passenger; That while he was so walking along and upon said Harrison Avenue the defendant, by its agent or servant, so carelessly, negligently and improperly operated and managed its said electric car that by reason of said careless, negligent and improper conduct the said car ran into and struck the plaintiff with great force and violence so that on account thereof the plaintiff was then and there thrown upon the pavement and suffered severe and permanent injuries, etc.; that he became liable to pay divers and large sums of money endeavoring to be healed and cured of his injuries.

The second count avers the facts substantially as set forth in the first count with this difference, however, that it charges a wilful and wanton injury and also charges that the plaintiff was in the exercise of due care and caution for his own safety.

Issue was joined. A Jury was called and heard the evidence and at the close of the case on the part of the plaintiff, on motion of the defendant, the court withdrew the second count of the declaration from the consideration of the jury, holding there

The second count covers the same subject matter as the first count, but it is framed in the negative. It alleges that the defendant, by his acts and omissions, has caused the plaintiff to suffer damage to his property and to his person, and that the defendant is liable to the plaintiff for the same. The second count is framed in the negative because the plaintiff is alleging that the defendant has acted in a wrongful manner, and that the defendant is liable to the plaintiff for the same. The second count is framed in the negative because the plaintiff is alleging that the defendant has acted in a wrongful manner, and that the defendant is liable to the plaintiff for the same.

was no evidence upon which to base a recovery under the said second count. Also on motion of the defendant the court instructed the jury to find the defendant not guilty under the first count of the declaration. Judgment was rendered on the verdict and this appeal is prosecuted by the plaintiff.

A number of reasons are assigned for a reversal of the judgment. The result of this cause must stand or fall very largely upon testimony of the plaintiff. It appears that Kishwaukee Street runs North and South and crosses Harrison Avenue at a point about six blocks west of the place where the plaintiff received the injury. Harrison Avenue on which the car was travelling at the time the plaintiff alleges he received his injury runs east and west; the south line of Harrison Avenue is the south limit of the City of Rockford and all of Harrison Avenue which lies south of the middle line is outside of the limits of any incorporated city or village. There was a hard-surfaced road on Harrison Avenue from Kishwaukee Street to Eleventh Street mentioned in the testimony. Within a few feet south of this hard surfaced road were the tracks of the defendant. These tracks were not in the City of Rockford but were out in the country. The hard-surfaced road was eighteen feet wide.

The plaintiff testified that at Kishwaukee Street he crossed this road and crossed the street car tracks of the defendant and walked along the south side of Harrison Avenue in the country; that there were a few houses near Kishwaukee Street and for a short distance there was a sidewalk; that after he left the sidewalk he walked along the street in what he termed a path; that the path went along the south side of the defendant's tracks at a point about twenty feet west of a culvert, which culvert was near the intersection of Ninth Street and Harrison Avenue; that when the path turned up toward the street car tracks it ran along the south side of the tracks, not on the tracks but south of them, and

1. The following information was obtained from the records of the Federal Bureau of Investigation, Department of Justice, Washington, D. C., on the subject of the above captioned case:

[illegible]

that the path ran along in that location for about twenty feet and then the plaintiff claims the path turned up onto the street railway tracks, and that during the distance of twenty feet and until it reached the culvert, the path was not on the street railway tracks.

Plaintiff further testified that as he followed the path where it went up close to the track, and twenty feet west of the culvert, he saw defendant's car west of him, travelling east on the track along Harrison Avenue in the same direction as the plaintiff was going and approaching him from the rear; that he saw the lights in the car and knew it was a street car; that he walked along the path south of the tracks for the distance of twenty feet and while he was walking along there he knew the street car was approaching; that after he had travelled the twenty feet and was near the culvert, he stepped up onto the tracks but when he stepped up on to the tracks he did not look to see where the street car was; that he paid no attention to it and that he stepped on to the street car tracks, took one step and was then struck by the car which he had seen and knew was coming. The plaintiff further testified that it was his intention to go to Ninth Street and there take the street car.

From the testimony of the plaintiff it will be seen that he was travelling east; that the street car was going east and that the plaintiff was on the south side of the track; that he knew the car was on the track; that he saw the lights in and on the car; that he suddenly stepped upon the track from the south and was struck by the car.

It appears from testimony of witnesses who were standing on Ninth Street near Harrison Avenue waiting for the car that they saw the street car coming from the west; that they could see it plainly; that its head light was burning and the lights in the car were burning; that the car tracks were uneven; that the

[illegible]

car was making a noise; that there was nothing between the appellant and the street car at any time.

In view of the facts as disclosed by the record the question arises, did the court err, first, in withdrawing the second count of the declaration from the consideration of the jury, and was it error to direct a verdict under the first count charging common law negligence?

The testimony relied upon by the plaintiff as bearing upon his right of recovery under the second count of the declaration is that certain witnesses testified that the car was travelling at a fast speed; that the street car was travelling real fast.

We have been unable to find where any witness has undertaken to testify as to the rate of speed the car was travelling at or immediately before the time that the plaintiff was struck.

It has been repeatedly held that a violation of the statute of the State or the ordinance of a City governing speed of automobiles or trains, is not of itself proof of wilfulness in the infliction of an injury, though such violation be an unlawful act. *Streator, Admr. etc. vs Humrichouse*, 261, Ill App. 556-564-565, and cases cited.

Nor is an injury regarded as constructively intentional unless it appears that it was the direct, usual, natural and probable result of such unlawful act. *Enoch vs Trevett*, 229 Ill. App. 235-240.

The motorman could not be charged with wilfulness or wantonness until it became apparent that the plaintiff would be or was in a place of danger. He had the right to act on the presumption that plaintiff would do what a reasonably prudent man would do and refrain from going upon the track, or putting himself in a place of danger. *Morgan vs N. Y. C. R.R. Co.*, 327 Ill. 339-345-346.

In *Lamarie vs C.C.C. & St. L. Ry. Co.*, 217 Ill. App. 296,

was taking a notice; that there was nothing between the defendant

and the plaintiff at that time.

In view of the facts as disclosed by the record the
court, in its opinion, did the court say, that, in withdrawing the record
from the testimony of the plaintiff, the court, in its
opinion, did the court say, that, in withdrawing the record

negligence?

The testimony relied upon by the plaintiff in its opinion
right of recovery under the second count of the declaration is
certainly sufficient to establish that the car was travelling at a
speed; that the driver was travelling very fast.

We have been unable to find more than a few words here under
as to really as to the rate of speed the car was travelling at
immediately before the time that the plaintiff was struck.

It has been repeatedly held that a violation of the
laws of the State of the existence of a duty to exercise care in
driving a motor vehicle, and that it is a violation of the
duty of an driver, through such violation to be an unlawful act.
color, Adam, etc. vs. Commonwealth, 231, 111 App. 555-556-557;

cases cited.

Now is an injury regarded as constitutively intentional
as it appears that it was the direct, natural, and neces-
sary result of the defendant's act. In such a case, the injury is

The motorist could not be charged with willfulness or intention
until it became apparent that the plaintiff would be in
line of danger. He had the right to not on the assumption that
plaintiff would do what a reasonably prudent man would do and not
to turn upon the track, or putting himself in a place of
danger, as in the case of the plaintiff, 231, 111 App. 555-556-557.

In the case of the plaintiff, 231, 111 App. 555-556-557.

the court, quoting from 29 Cyc. 510, at page 505, said: "In order that one may be held guilty of wilful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wilful act or omitted some known duty which produced the injurious result. In order to establish wantonness it is not necessary to show an entire want of care. The violation of a statute does not constitute a wilful wrong. A wilful injury will not be inferred when the result may be reasonably attributed to negligence or inattention."

In view of the rule as we understand it, considered in connection with the testimony as disclosed by the record, we are not prepared to say that the court erred in withdrawing the second count of the declaration from the consideration of the jury. In so holding we are not unmindful of the fact that the rule is that if there was evidence from which a jury could find that the servant of the defendant was guilty of wilful and wanton conduct which was the proximate cause of the injury, then contributory negligence would not defeat a right of recovery. Under the first count of the declaration in which the plaintiff charged common law negligence the burden of proof was upon him to affirmatively prove that he was in the exercise of reasonable care for his own safety at the time and immediately before he was injured and that if he failed to do so a verdict was properly directed.

In view of the state of the record we are of the opinion there is no evidence of negligence on the part of the defendant. The plaintiff was walking along the side of the street car track and testified he looked backward and saw a street car coming. He gave his opinion as to how far the car was away. The evidence shows that he walked along this path until he came near a culvert

...posting from 22 April 1910, at page 100, and ...
...it was said he had called on ...
...that he was ...
...of ...
...the ...
...the ...

...it is an omitted name ...
...In order to establish ...
...of ...
...a ...
...the ...

...In view of the ...
...with the testimony ...
...not prepared to say ...
...and ...
...no ...
...it ...
...of the ...
...it was the ...
...license would not ...
...at of the ...
...license the ...
...he was in the ...
...the time and ...
...to do so a ...

...In view of the ...
...There is no ...
...The ...
...and ...
...the ...
...the ...

where the path went onto the tracks. He testified he did not look back to see how far the car was but raised his hand as he stepped on the track.

The evidence is conflicting just how far plaintiff went after he left the place of safety and stepped on to the track. It varies from one to four steps. He knew the car was coming and without any thought or caution on his part deliberately stepped in front of it. In our opinion the plaintiff's own thoughtlessness and negligence was the proximate cause of the injury and that the trial court properly directed a verdict under the first count of the declaration and the judgment of the Circuit Court of Winnebago County will be affirmed.

Judgment affirmed,

He was not in the truck. He was not in the truck. He was not in the truck.

TABLE 1

THE UNIVERSITY OF CHICAGO PRESS

STATE OF ILLINOIS,

SECOND DISTRICT

}
SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 L.A. 628²

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 8 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
Second District
FEBRUARY TERM A. D. 1932

General No. 8454

Agenda 10

| | | |
|------------------------------|---|------------------|
| STELLA DOMBROWSKY, | : | |
| | : | |
| Appellee, | : | APPEAL FROM THE |
| | : | CIRCUIT COURT OF |
| VS | : | LAKE COUNTY. |
| | : | |
| PRUDENTIAL INSURANCE COMPANY | : | |
| OF AMERICA, a Corporation, | : | |
| | : | |
| Appellant. | : | |

Jett, J.

This suit was instituted by Stella Dombrowsky, appellee, hereinafter referred to as plaintiff, to recover on a policy of insurance on the life of Fred A. Dombrowsky for \$2,000, against the Prudential Insurance Company of America, a corporation, appellant, hereafter called defendant. A jury trial was had resulting in a finding and judgment for the plaintiff and against the defendant for the sum of \$2058.33 and costs of suit, from which judgment appellant prosecutes this appeal.

The declaration avers that on July 1st, 1930, in consideration of the payment of \$60.14 by Fred A. Dombrowsky the defendant issued and delivered to him the policy of insurance declared upon, a copy of which is set forth in the declaration; that on August 24th, 1930, while said policy was in full force and effect, and while no premium was in default, the said Dombrowsky died; that on the 19th day of September, 1930, the plaintiff notified the defendant of the death of said insured and made demand for payment and that on the 13th day of November, 1930, the defendant denied liability and refused to pay. On June 17th, 1931, plaintiff filed an addit-

IN THE
FEDERAL COURT OF DISTRICTS
WASHINGTON, D. C.
JANUARY TERM A. D. 1932

Plaintiff

Defendant

WILLIAM BROWDER

WILLIAM BROWDER

WILLIAM BROWDER

WILLIAM BROWDER
WILLIAM BROWDER

Appellant

This suit was instituted by William Browder, Plaintiff, hereinafter referred to as Plaintiff, to recover on a life insurance policy of \$20,000.00, payable to the Plaintiff, which was issued by the Federal Insurance Company of America, a corporation, hereinafter referred to as Defendant. A jury trial was had resulting in a finding and judgment for the Plaintiff and awarding to the Plaintiff for the sum of \$20,000.00 and costs of suit, from

the Defendant Insurance Company of America.

The Defendant avers that on July 1st, 1930, in

consideration of the payment of \$20.00 by the Plaintiff to

Defendant issued and delivered to him the policy of insurance

known as, a copy of which is set forth in the declaration; that

on June 24th, 1930, while said policy was in full force and effect,

and while no premium was in default, the said Browder died; that

on the 1st day of September, 1930, the Plaintiff notified the

Defendant of the death of said insured and made demand for payment

of said policy on the 1st day of November, 1930, the Defendant having failed

to pay. On June 17th, 1931, Plaintiff filed an action

ional count to the declaration which repeats the averments contained in the first count and avers that defendant disclaimed any liability for the reason that the first premium on the said policy had not been paid, whereby the defendant waived the presentation of and filing of proof of death.

To the declaration the defendant pleaded the general issue, and gave notice of special defenses and filed an affidavit of merits setting forth the special matters relied upon to establish its defense. In its affidavit of merits the defendant sets forth as follows: "That the defendant has a good defense upon the merits to the whole of plaintiff's demands; that said policy was never delivered for the purpose of putting the same in force and effect as an insurance policy, but said Fred A. Dombrowsky obtained the custody of said policy at his own request and without consideration for the sole and only purpose of inspecting said policy; that no premium or other consideration was ever given or paid to defendant for said policy; that the \$60.14 payable on delivery of the policy was never paid to or received by defendant, or by any of its duly authorized agents. Defendant denies that by any of its acts, deeds or omissions to act it waived any objections as to the form, time and manner of giving proofs of death as required by said policy and that defendant has never received nor has plaintiff ever made due proof of death.

The theory of the case on the part of the plaintiff is that Fred A. Dombrowsky having obtained possession of the policy which recites "semi-annual premium \$60.14, payable on the delivery of this policy, the receipt of which premium is hereby acknowledged", the defendant is estopped from denying that the first premium was paid and is precluded from showing that the policy was never in force.

It is the contention of the defendant that the first semi-annual premium was never paid; that the policy was never in force and effect; that it was never delivered for the purpose of

constituting a contract of insurance but was left with Fred A. Dombrowsky at his own request and for inspection only; that the defendant is not estopped from showing that the first premium was not paid, and that the policy was not even conditionally delivered with the intention of putting it in force upon any express condition and that plaintiff has no right to recover thereon because there was never a valid contract of insurance.

Practically the only question involved in this cause is the defense that the policy of insurance was never delivered to the insured but that the agent took the policy to the insured and delivered it to him for inspection, and neither the insured nor the defendant insurance company ever considered that the policy had been delivered to the insured so as to be binding upon the insurance company.

Some discussion is had relative to the question as to whether or not the premium had been paid, and where an insurance policy recites that the premium had been paid, whether or not the insurance company could then show that the premium had not been paid. In our view of the case it is unnecessary to discuss or decide this question.

The record discloses that the plaintiff testified that the policy in question dated July 1st, 1930, was found by her in the office of her husband, Fred A. Dombrowsky, after his death on August 24th, 1930; that she wrote to the defendant company with reference to the policy after her husband's death; that she received a reply from the defendant company and the court admitted a part of the letter which recited that the "full first premium was not paid." It is not denied that Dombrowsky had possession of the policy in his lifetime but the circumstances under which he obtained it were testified to by the agent of the defendant that she solicited the insured to take out the policy in June and August 1930; that on

...a contract of insurance but was left with Third A.

...of his own request and the investigation only; and the

...is not estopped from asserting that the Third A. was the

...and that the policy was not even conditionally delivered

...the intention of putting it in force upon any express condition

...that plaintiff has no right to recover thereon because there

...never a valid contract of insurance.

...the only question involved in this case is

...that the policy was delivered to the insured.

...but that the agent took the policy to the insured and delivered

...to the insured, and whether the insured was the defendant.

...insurance company ever considered that the policy had been

...to the insured so as to be binding upon the insurance

...

...Some discussion is had relative to the question as to

...of not the premium had been paid, and there is no evidence

...that the premium had been paid, and there is no evidence

...that the premium had been paid, and there is no evidence

...that the premium had been paid, and there is no evidence

The record discloses that the plaintiff testified

...the policy in question dated July 1st, 1930, was issued by her

...the office of her husband, Fred J. Dabrowsky, after his death.

...that she was a wife of the defendant's company after his

...to the policy after her husband's death; that she received

...from the defendant company and the policy was not paid.

...which testified that the full first premium was not paid.

...and stated that Dabrowsky had possession of the policy in his

...and the defendant's wife, who is admitted to state

...to the fact of the defendant that she testified the

...to state that the policy in issue was issued in June and August 1930; that on

August 14th, 1930, she left the policy with him at his request for inspection only and he signed a receipt for it, made out on his own letterhead and gave it to her. The agent Margaret Haggerty is corroborated by the witness Linda Edwards who was with her and saw Dombrowsky sign the receipt. The manager A. Van Goldsman of defendant company testified that no money was paid on the policy to him.

On the part of the plaintiff no effort was made to prove the payment of the first premium upon the policy. The plaintiff relies upon the fact that the policy was found in the office of the insured and the recital in the policy to the effect that the premium had been received.

While it is true that possession of a policy of insurance by the applicant raises a presumption that the policy has been delivered and accepted, yet such presumption may be rebutted by showing that such applicant was permitted to take the policy merely for the purpose of examining it and determining, after such examination, whether or not he would accept it. Richardson vs Northwestern Mutual Life Ins. Co., 143 Ill. App. 273-282; Equitable Life Assurance Co. vs Mueller, 99 Ill. App. 462; N. Y. Life Ins. Co. vs Easton, 69 Ill. App. 479.

Possession of a contract by the party seeking to enforce it is presumptive evidence of its delivery but is not conclusive, and evidence may be admitted to prove fraud in obtaining possession or that the contract was in effect never delivered. Kilcoin vs Ortell, et al, 302 Ill. 531.

After an investigation of the authorities we are of the opinion that possession of the policy is prima facie proof that the policy was delivered and accepted and can be overcome by clear and convincing proof.

We are of the opinion that the court, under such a state of facts as are presented in this cause, had the right to per-

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

...and gave it to her. The agent "did not know" if ...
...by the witness "Linda" "because she was with her and saw ...

whether or not he would accept it. Richardson is

1. General 2. Particular 3. Specific 4. General 5. Particular 6. Specific 7. General 8. Particular 9. Specific 10. General 11. Particular 12. Specific 13. General 14. Particular 15. Specific 16. General 17. Particular 18. Specific 19. General 20. Particular 21. Specific 22. General 23. Particular 24. Specific 25. General 26. Particular 27. Specific 28. General 29. Particular 30. Specific 31. General 32. Particular 33. Specific 34. General 35. Particular 36. Specific 37. General 38. Particular 39. Specific 40. General 41. Particular 42. Specific 43. General 44. Particular 45. Specific 46. General 47. Particular 48. Specific 49. General 50. Particular 51. Specific 52. General 53. Particular 54. Specific 55. General 56. Particular 57. Specific 58. General 59. Particular 60. Specific 61. General 62. Particular 63. Specific 64. General 65. Particular 66. Specific 67. General 68. Particular 69. Specific 70. General 71. Particular 72. Specific 73. General 74. Particular 75. Specific 76. General 77. Particular 78. Specific 79. General 80. Particular 81. Specific 82. General 83. Particular 84. Specific 85. General 86. Particular 87. Specific 88. General 89. Particular 90. Specific 91. General 92. Particular 93. Specific 94. General 95. Particular 96. Specific 97. General 98. Particular 99. Specific 100. General 101. Particular 102. Specific 103. General 104. Particular 105. Specific 106. General 107. Particular 108. Specific 109. General 110. Particular 111. Specific 112. General 113. Particular 114. Specific 115. General 116. Particular 117. Specific 118. General 119. Particular 120. Specific 121. General 122. Particular 123. Specific 124. General 125. Particular 126. Specific 127. General 128. Particular 129. Specific 130. General 131. Particular 132. Specific 133. General 134. Particular 135. Specific 136. General 137. Particular 138. Specific 139. General 140. Particular 141. Specific 142. General 143. Particular 144. Specific 145. General 146. Particular 147. Specific 148. General 149. Particular 150. Specific 151. General 152. Particular 153. Specific 154. General 155. Particular 156. Specific 157. General 158. Particular 159. Specific 160. General 161. Particular 162. Specific 163. General 164. Particular 165. Specific 166. General 167. Particular 168. Specific 169. General 170. Particular 171. Specific 172. General 173. Particular 174. Specific 175. General 176. Particular 177. Specific 178. General 179. Particular 180. Specific 181. General 182. Particular 183. Specific 184. General 185. Particular 186. Specific 187. General 188. Particular 189. Specific 190. General 191. Particular 192. Specific 193. General 194. Particular 195. Specific 196. General 197. Particular 198. Specific 199. General 200. Particular 201. Specific 202. General 203. Particular 204. Specific 205. General 206. Particular 207. Specific 208. General 209. Particular 210. Specific 211. General 212. Particular 213. Specific 214. General 215. Particular 216. Specific 217. General 218. Particular 219. Specific 220. General 221. Particular 222. Specific 223. General 224. Particular 225. Specific 226. General 227. Particular 228. Specific 229. General 230. Particular 231. Specific 232. General 233. Particular 234. Specific 235. General 236. Particular 237. Specific 238. General 239. Particular 240. Specific 241. General 242. Particular 243. Specific 244. General 245. Particular 246. Specific 247. General 248. Particular 249. Specific 250. General 251. Particular 252. Specific 253. General 254. Particular 255. Specific 256. General 257. Particular 258. Specific 259. General 260. Particular 261. Specific 262. General 263. Particular 264. Specific 265. General 266. Particular 267. Specific 268. General 269. Particular 270. Specific 271. General 272. Particular 273. Specific 274. General 275. Particular 276. Specific 277. General 278. Particular 279. Specific 280. General 281. Particular 282. Specific 283. General 284. Particular 285. Specific 286. General 287. Particular 288. Specific 289. General 290. Particular 291. Specific 292. General 293. Particular 294. Specific 295. General 296. Particular 297. Specific 298. General 299. Particular 300. Specific 301. General 302. Particular 303. Specific 304. General 305. Particular 306. Specific 307. General 308. Particular 309. Specific 310. General 311. Particular 312. Specific 313. General 314. Particular 315. Specific 316. General 317. Particular 318. Specific 319. General 320. Particular 321. Specific 322. General 323. Particular 324. Specific 325. General 326. Particular 327. Specific 328. General 329. Particular 330. Specific 331. General 332. Particular 333. Specific 334. General 335. Particular 336. Specific 337. General 338. Particular 339. Specific 340. General 341. Particular

THE UNIVERSITY OF CHICAGO

reason for that the contract was in effect until 1945.

After an investigation of the authorities we are of the opinion that the information is reliable.

There is a significant positive correlation between the number of years of education and the number of years of experience. The correlation coefficient is 0.65, which is statistically significant at the 0.05 level.

2. THE STATE OF TEXAS, County of EL PASO, do hereby certify that JOHN W. HARRIS is the owner of the above described land, and that he is the owner of the same for the purpose of the above described land.

mit the jury to hear testimony bearing upon the question as to whether or not there was a delivery of the policy and that the jury under proper instructions pass upon the question of fact presented to them.

It is the contention of the defendant that the trial court erred in the giving of instructions on the part of the plaintiff and refused instructions offered by the defendant. The first instruction given on the part of the plaintiff reads as follows: "You are instructed that if you believe from the evidence that the policy sued upon was delivered to Fred A. Dombrowsky prior to his death and was accepted by him either at the time or at any time prior to his death as a contract of insurance, then plaintiff is entitled to recover in this suit the amount named in the policy with five per cent interest from the 15th day of November, 1930." It is insisted that by this instruction the court ignored the element of the intention of the parties in connection with the delivery of the policy. Under the pleadings and evidence this was vital. There was no evidence of the acceptance of the policy by Fred A. Dombrowsky "at any time prior to his death" and therefore this instruction is erroneous in telling the jury that they could base their verdict thereon for the amount named in the policy. The record also shows that the defendant offered the following instruction: "The court instructs the jury that if you believe from all of the evidence in this case that the policy sued upon was never delivered to the alleged insured, Fred A. Dombrowsky, or any one on his behalf, but was left with the said Fred A. Dombrowsky for inspection, you must find the issues for the defendant. This instruction, in our opinion, presented a question that was exceedingly important to the defendant. The instruction stated the law arising out of the facts in the case, that is, that if the policy was never delivered to the insured but was left with him for inspection that the jury should find the issues

for the defendant. This was the principal question in the case, whether the policy was delivered for acceptance or for inspection. We think it was reversible error for the court not to have given this instruction.

We conclude, therefore, that reversible error was committed in the trial of the cause and that the judgment of the Circuit Court of Lake County should be reversed and the cause remanded, which is accordingly done.

Reversed and remanded.

the following table are the principal sources of the
 material for the present work. The sources are
 (1) the original records of the various
 departments of the Government.

(2) the reports of the various
 departments of the Government.
 (3) the reports of the various
 departments of the Government.
 (4) the reports of the various
 departments of the Government.

THE following table are the principal sources of the

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

1127
AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the third day of May, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:
Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

267 I.A. 628³

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

February Term, A.D. 1932

Wilmetta Ellis,

appellant,

vs.

Appeal from the County Court of

Livingston County

The National Bank of

Pontiac, a corporation,

appellee,

Jett, J:

This is an appeal by Wilmetta Ellis, appellant, from a judgment rendered by the County Court of Livingston County in a trial of the right of property finding the issues in favor of appellee, The National Bank of Pontiac, from which judgment the appellant, Wilmetta Ellis, prayed for and perfected an appeal to this court.

It appears that on the 11th day of September 1931, one Ervin V. Wade, son-in-law of appellant, claimed to be indebted to her in the sum of \$3,000; that the said Ervin V. Wade together with Pansy Wade, his wife, executed a note to appellant for \$3,000 and on the same day they executed and delivered to her as security therefor, a chattel mortgage covering certain personal property, the subject matter of this litigation, which chattel mortgage was duly acknowledged and recorded on the date of its execution; that on the 25th day of September 1931, the said Ervin V. Wade and Pansy Wade executed a supplemental chattel mortgage to the appellant to that executed on September 11th, 1931, covering the grain described in the mortgage of September 11th, 1931, which supplemental mortgage was acknowledged and filed for record on the same day; that on the 28th day of September, 1931, appellee secured a judgment by confession against the said Ervin V. Wade in the sum of \$1936.57; that on the said 28th day of September, 1931, there was issued out of

In the Appellate Court of Illinois

Second District

January Term, A.D. 1931

Illinois, 1931

Appellant,

Against from the County Court of

Livingston County

The National Bank of

Peoria, a corporation,

Respondent.

Let it be

This is an appeal by Elmer W. Williams, appellant, from a judgment rendered by the County Court of Livingston County in a trial of the right of property in the premises in favor of respondent, The National Bank of Peoria, from which judgment the appellant, Elmer W. Williams, prayed for and requested an appeal to this court.

It appears that on the 15th day of September 1931, one

Ervin V. Wade, administrator of appellant, claimed to be indebted to her in the sum of \$5,000; that the said Ervin V. Wade together with Penny Wade, his wife, executed a note to respondent for \$5,000 and on the same day they executed and delivered to her as security therefor, a chattel mortgage covering certain personal property, the subject matter of this litigation, which chattel mortgage was duly acknowledged and recorded on the date of its execution; that on the 25th day of September 1931, the said Ervin V. Wade and Penny Wade executed a supplemental chattel mortgage to the respondent in that executed on September 15th, 1931, covering the same described in the mortgage of September 15th, 1931, which supplemental mortgage was acknowledged and filed for record on the same day; that on the 25th day of September, 1931, respondent executed a judgment by and

location against the said Ervin V. Wade in the sum of \$1238.87; that on the said 25th day of September, 1931, there was issued out of

the office of the Clerk of the Circuit Court of Livingston County an execution in favor of appellee and against the said Ervin V. Wade; that by virtue of the execution George A. Heckman, sheriff of Livingston County made a levy on October 16th, 1931, upon the property included in the chattel mortgages; that on the 19th day of October, 1931, appellant served upon said George A. Heckman, sheriff as aforesaid, a certain notice of demand, whereby she demanded possession of the personal property levied upon by the sheriff in favor of appellee; that on the 22nd day of October, 1931, appellant served upon the said sheriff a notice that she was claiming the property covered by said levy and that the notice was given to and in conformity with the statute in such case made and provided; that the County Court set the case down for hearing and a trial was had on the 9th day of November, 1931, of the right of property by the court, a jury having been waived, and at which the court heard testimony bearing upon the issues in the cause; that on the 13th day of November, 1931, the court rendered judgment in favor of appellee, the National Bank of Pontiac, and against the appellant, Wilmetta Ellis, which judgment was for costs against the appellant and directed that the said George A. Heckman, sheriff, should proceed to sell the property levied upon by virtue of the execution issued in favor of appellee.

The question presented by this record is whether or not the lien created by the mortgages held by the appellant, Wilmetta Ellis, is a prior, valid and superior lien on the personal property which is the subject matter of this case as against the lien created by virtue of the execution of appellee, the National Bank of Pontiac.

It is the claim of appellant that the alleged indebtedness purported to be secured by the chattel mortgages was a culmination of loans made by her to Ervin V. Wade, her son-in-law, extending over a period of four years. Appellant testified to having a note book in which she made an entry each time a loan was made of the

the office of the Clerk of the District Court of Livingston County was made a levy on October 19th, 1901, from the
property included in the original mortgage; that on the 19th day of
October, 1901, appellant served upon the defendant, George A. Heston, a certain notice of summons, whereby the defendant
was notified of the personal summons issued upon him by the sheriff in
favor of appellee; that on the 19th day of October, 1901, appellant
served upon the said sheriff a notice to show cause that the writ should be
discontinued and the writ was given to him in conformity with the statute in such cases made and provided; that the
County Court set the case down for hearing and a trial was had on the
24th day of November, 1901, at the time of which the jury, having been
sworn upon the issues in the case; that on the 19th day of
November, 1901, the court rendered judgment in favor of appellee,
the National Bank of Fortino, and against the appellant, Illinois
State, which judgment was for costs against the appellant and
directed that the said George A. Heston, sheriff, should proceed to
sell the property listed upon by virtue of the execution issued in
favor of appellee.

The question presented by this record is whether or
not the lien created by the mortgage held by the appellant, Illinois
State, is a valid and superior lien on the personal property
which is the subject matter of this case and against the claim asserted
by virtue of the execution of appellee, the National Bank of Fortino.

It is the plaintiff's position that the lien created by the mortgage was a valid lien
on the property and that the same was not defeated by the execution of appellee, the National Bank of Fortino, over a period of ten years. Appellant testified to having a note
made in which the same was made an entry each time a loan was made of the

date and amount thereof and these various amounts aggregated approximately the sum of \$3,000, claimed by the appellant to be due her from her son-in-law.

The record discloses that when the book was produced and turned over to counsel for appellee for inspection the note book had a calendar for the years 1930 and 1931, and that these memoranda were claimed to have been made therein as early as 1927. When these facts were called to the attention of appellant she apparently was confused and then stated that she had copied from an old book containing a statement of her account into the book brought into court and had destroyed the old book. The record further discloses that there were produced during the progress of the trial presumably by Wade, a number of notes, ten in number, variously dated from November 29th, 1927, up to and including June 26th, 1931. It is the contention of appellant that these notes were given by Wade to her totaling the sum for which she took the chattel mortgages. The ten notes produced and marked as Exhibits "6" to "15" inclusive, and the note book being Exhibit "1", were properly certified and the originals have been presented to this court for examination. On examination of the notes it is found they are all made on the same form of note, the written portions above the signature are written in the same handwriting with lead pencil and the same pencil all through. The notes were dated variously from November 29th, 1927, to June 26th, 1931. The notes were signed in ink by Ervin V. Wade with the same pen and the same color of ink and the endorsements on the back of the notes were in lead pencil but on some of them the first endorsement of interest was in the year 1930 and the next dated 1928, and the next 1929. From an examination of the note book and Exhibits "6" to "15" inclusive certified up in original form, the matters pointed out by counsel for appellee relative to the book and notes were quite obvious.

also not amount thereof and these various amounts approximated approximately the sum of \$5,000, claimed by the appellant to be

The record discloses that when the book was produced and turned over to counsel for purposes for inspection the note book had a calendar for the years 1930 and 1931, and that these memoranda were claimed to have been made therein as early as 1927. When these facts were called to the attention of appellant the apparently was confused and then stated that she had copied from an old book containing a statement of her account into the book brought into court and had destroyed the old book. The record further discloses that there were produced during the progress of the trial presumably by Wade, a number of notes, ten in number, variously dated from November 28th, 1927, up to and including June 28th, 1931. It is the contention of appellant that these notes were given by Wade to her for telling the sum for which she took the chattel mortgages. The ten notes produced and marked as Exhibits "8" to "17" inclusive, and the note book being Exhibit "1", were properly certified and the originals have been presented to this court for examination. On examination of the notes it is found they are all made on the same form of note, the written portions above the signature are written in the same handwriting with lead pencil and the same overall all through. The notes were dated variously from November 28th, 1927, to June 28th, 1931. The notes were signed in ink by Edwin V. Wade with the same pen and the same color of ink and the endorsements on the back of the notes were in lead pencil but on some of them the first endorsement on the back was in the year 1930 and the next dated 1928, and the next 1927. From an examination of the note book and Exhibits "8" to "17" inclusive certified up in original form, the matters noticed out by counsel for appellee relative to the book and notes are as follows:

In view of the testimony of the appellant considered in connection with the Exhibits certified to this Court no other conclusion could be reached other than that the claim of the appellant is not well founded. This being true, it follows that she and her said son-in-law participated in a fraud with a view of preventing the property of the son-in-law Wade being subjected to the payment of his legitimate indebtedness to appellee.

It will be remembered that the trial judge saw and heard the witnesses. He had an opportunity to observe the appellant during the giving of her testimony and it appears that he asked her a number of questions. The judge had an opportunity to examine the book account and notes in question and consider them in connection with her testimony and the testimony of her son-in-law, and it necessarily follows that by reason of the judgment which was rendered by the court, the court was of the opinion that the chattel mortgages were fraudulent. Since the trial court who saw and heard the witnesses and examined the exhibits certified to this court made a finding and judgment in favor of appellee, we are not prepared to say that he was not justified in so doing.

In our opinion the judgment is right and the judgment of the County Court of Livingston County will be affirmed, which is accordingly done.

Judgment affirmed.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hercunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

Abstract
Opinion filed May 11, 1932
Rehearing denied 10-11-1932

267 L.A. 628 ⁴ 

General No. 8562

Agenda No. 22

October Term, 1931

BART GILLAM AND VESTA GILLAM, Appellees,

vs.

JOHNSON OIL REFINING COMPANY, Appellant.

Appeal from McDonough

NIEHAUS, P. J.

The appellees herein, Bart Gillam and Vesta Gillam, filed a bill of complaint against the appellant, Johnson Oil Refining Company, in the Circuit Court of McDonough County, which contains the following allegations concerning the subject matter of this suit:

That there is now pending and undetermined in this court an action at law of Forceful Entry and Detainer against these complainants, the same being an appeal from Justice of the Peace Court wherein the suit was instituted by the defendant, Johnson Oil Refining Company, herein made a party defendant to this amended bill of complaint, as plaintiff, seeks to oust these complainants from the possession of the real estate and premises hereinafter described, which suit at law is entitled "Johnson Oil Refining Company, Plaintiff, vs. Bart Gillam and Vesta Gillam, Defendants," and is numbered 3973 and which suit is now set for trial at the present term of this court. Complainants further represent that there was a trial of said suit at law in this court at the January Term, A. D. 1929, wherein a jury rendered a verdict in favor of the defendants Bart Gillam and Vesta Gillam, and judgment was rendered by the court on said verdict in favor of said defendants Bart Gillam and Vesta Gillam, which judgment was by the Appellate Court of the Third District of the State of Illinois, on appeal by said plaintiff, reversed and the cause remanded to this court and said cause has been, by the procurement of said Johnson Oil Refining Company, plaintiff therein, reinstated in this court and is now pending for further proceedings in this court on the law docket of this Court:

That the Johnson Oil Refining Company bases its alleged right to the possession of said real estate solely upon the terms and provisions of a certain writing purporting to be an instrument under seal, namely, a lease of the premises therein described from these complainants, Bart Gillam and Vesta Gillam, to the Johnson Oil Refining Company, and a Tank Wagon Quantity Discount Contract, executed by these complainants and the defendant.

The lease referred to in the bill of complaint is in words and figures as follows:

“JOHNSON OIL REFINING COMPANY
208 South LaSalle St.,
Chicago, Ill.

Lease with Option to Purchase

MACOMB FILLING STATION NO. 11, LOCATED BETWEEN BUSHNELL AND MACOMB, ILL.

THIS INDENTURE, Made this 27th day of September, 1926, by and between Bart Gillam of the McDonough County, State of Illinois, First Party, and Johnson Oil Refining Company, a corporation organized and existing under the laws of the State of Illinois, Second Party.

WITNESSETH, That for and in consideration of the covenants and agreements hereinafter set forth, first party hereby leases to second party the following described premises situated in the County of McDonough, State of Illinois, to-wit:

Beginning at the southwest corner of the southwest quarter of section thirty-three, Township Six North, Range One West of the fourth principal meridian in McDonough County, Illinois, thence running north ninety-five feet, thence east one hundred thirty-six feet, thence south to the north side of the public highway, thence west along the north side of said public highway to place of beginning, together with all buildings and equipment thereon forming a part of a filling station now owned and operated by first party, for a term beginning on the 27th day of September, 1926, and ending on the 27th day of September, 1936; for a rental of One Hundred Twenty and no-100 Dollars (\$120.00) per annum, payable in advance in equal monthly installments, on the first day of each month. Said second party, however, reserves the right to terminate this lease at any time by giving first party ten (10) days' written notice of its intention so to do.

First party further covenants and agrees as follows:

1. That during the term of this lease he will pay all general and special taxes and assessments and any water, light or heat taxes or expenses that may be levied, assessed or charged against said premises or against any property owned by him located thereon.

3. At the expiration or termination of this lease by lapse of time, or otherwise, second party shall have, and is hereby given, the right at any time within thirty (30) days after such termination to enter upon and remove from said premises any equipment by it at any time placed thereon.

5. Second party shall have and it is hereby given, the further privilege of purchasing said premises with the building and equipment thereon used in connection with, and as a part of, said filling station, at any time prior to the expiration of this lease, or any renewal thereof, for the sum of Five Thousand Dollars (\$5,000.00); provided said second party shall give first party notice in writing of its election to exercise said option to purchase at least thirty (30) days prior to the expiration of this lease or any renewal thereof. In the event of the exercise of said option to purchase by second party, first party agrees to convey, or cause to be conveyed, a good merchantable title to said described premises by a good and sufficient warranty deed, in which deed the wife of the first party (if he shall be married at said time) shall join for the purpose of conveying or releasing any title, right of dower, right of homestead or other rights which said wife shall then have in said premises, said premises to be conveyed free from all incumbrances whatsoever except current taxes, which shall be pro-rated as of the date of said deed, First party further agrees, within twenty (20) days after receipt of notice from second party exercising said option of purchase, to furnish second party with a merchantable abstract of title brought down to said date, showing a merchantable title to said premises in first party free from all liens and incumbrances except as above stated. In case any encumbrances appear second party shall have the right to pay out of the purchase price the amounts necessary to remove such incumbrances and shall be entitled to credit on the purchase price therefor. From and after the giving of such notice of election to exercise the option to purchase, second party shall cease to be liable for the rent hereinbefore reserved, but shall thereafter pay interest to first party at the rate of five per cent per annum on the purchase price until said purchase price is paid.

6. And Vesta Gillam, wife of said first party, now executed this lease and option of purchase, and agrees hereby, in the event of the exercise of said option to purchase by second party, to join said first party in the execution of the warranty deed above specified, for the purpose of conveying any title, right of dower, right of homestead or other rights which she now has or may hereafter have in said premises.

Second party further covenants and agrees as follows:

1. To pay the rental for said premises as above specified.

2. To pay all taxes levied or assessed on the property belonging to it located on said premises.

3. If said first party is employed by second party, to carry out all the obligations in its standard sub-agent's filling station agreement undertaken by it.

4. That in the event said first party is employed to operate

said filling station, as above specified, it will give him the additional privilege of handling and dealing in automobile accessories, providing the exercise of such privilege does not interfere with the proper operation of said filling station, anything in said sub-agent's filling station agreement stated to the contrary notwithstanding; but said first party in that event agrees to indemnify second party from any and all claims of third parties arising or in any way growing out of any such transactions.

5. That at the expiration of this lease (unless said option to purchase above provided is exercised), second party will return to first party the said premises with the equipment thereon belonging to him, in as good condition as at the date hereof, ordinary wear and tear excepted.

GENERAL AGREEMENTS

1. It is mutually agreed that in the event the above premises are rendered unfit for occupancy by reason of fire, storm or any other cause, the obligations on the part of the second part to pay the rent herein reserved shall cease until such time as said property is again put in satisfactory condition for occupancy, which first party agrees to do at his own expense within sixty (60) days after said premises have been rendered untenable, as above, aforesaid.

2. Any notice hereby required to be given first party by second party, may be delivered to him in person, or deposited in the United States mails as Registered Mail, postage prepaid and addressed to first party at the address stated at the foot of this agreement.

It is further covenanted and agreed that if default shall at any time be made by second party in payment of the rent when due to first party, and such default shall continue for thirty days after notice in writing thereof to second party, first party shall have the right to terminate this agreement.

TANK WAGON QUANTITY DISCOUNT T W 993

Second party further agrees so long as the tank wagon quantity discount is kept in force by the second party, to sell and deliver by its tank wagons to first party for use at said filling station Johnson Gasoline in accordance with the requirements of first party, for which first party shall pay to second party in cash the tank wagon price of second party current at the date and place of delivery but subject, however, to the following special tank wagon quantity discounts:

1. In the event total deliveries of gasoline purchased by first party shall in any one calendar month amount to the quantity stated below, first party shall be entitled to the following discount:

| Deliveries | |
|--|-----------------|
| Over 750 gal, per Calendar month . . | 1/2c per gal. |
| Over 2000 gal, per Calendar month . . | 3/4c per gal. |
| Over 3000 gal, per Calendar month . . . | 1c per gal. |
| Over 6000 gal, per Calendar month . . | 1 1/4c per gal. |
| Over 10000 gal, per Calendar month . . . | 2c per gal. |

2. Payments of such discounts will be made by check to first party on or before the 15th day of the month following any month on which such discounts may be due.

3. If at the end of any year the entire amount purchased during such year under this agreement shall equal at least the quantities shown above, a further discount will be determined at the following rates:

| Deliveries | |
|------------------------------|-------------------------|
| Over 9000 gallons per year | 1/4c per gallon |
| Over 24000 gallons per year | 3/4c per gallon |
| Over 36000 gallons per year | 1c per gallon |
| Over 72000 gallons per year | 1 1/2c per gallon |
| Over 120000 gallons per year | 2c per gallon |

Any amount in which such discount shall exceed the total amounts that have been paid under the monthly discount provision above stated shall then be paid to first party.

4. Second party shall not be responsible for delays in delivery due to fire, flood, or other acts of God, strikes or differences with workmen, accident to plant or machinery, partial or total failure of transportation facilities or other sources of supply or any other cause beyond second party's control.

5. This tank wagon quantity discount provision is subject to cancellation by either party on ten days' written notice.

6. While this tank wagon quantity discount provision shall be effective, the rentals above provided to be paid by second party to first party shall be suspended, to become again effective on the termination of this quantity discount provision for any reason.

This agreement shall be binding upon and inure to the heirs, executors, administrators, successors and assigns, respectively of the parties hereto.

IN WITNESS WHEREOF, said first party together with the wife of said first party, have hereunto set their hands and seals, and second party has caused this instrument to be executed the day and year first above written.

| | | |
|-------------------|--------------------------|--------|
| Witnesses: | BART GILLAM | (Seal) |
| H. L. McFADDEN | First Party | |
| A. W. ALSEN | VESTA GILLAM | (Seal) |
| Recommended: | Wife of First Party | |
| A. W. ALSEN, | Address | |
| Division Manager, | R. F. D. Macomb, Ill. | |
| Attest: | JOHNSON OIL REFINING CO. | |
| I. H. JOHNSON, | By JAMES J. JOHNSON | |
| Secretary. | Vice-President." | |

The tank wagon quantity discount contract referred to in bill of complaint, is as follows:

"JOHNSON OIL REFINING COMPANY
208 South LaSalle Street
CHICAGO, ILLINOIS

MACOMB Filling Station No. 11
Located between Bushnell and Macomb, Ill.

TANK WAGON QUANTITY DISCOUNT CONTRACT

THIS AGREEMENT, made at Macomb, Ill., this 27th day of Sept. 1926, by and between JOHNSON OIL REFINING COMPANY, an Illinois corporation, as Seller and Bart Gillam of Macomb, Ill., as buyer, Witnesseth:

That the Seller hereby sells and agrees to deliver by its tank wagons, and the Buyer hereby purchases and agrees to receive at his place of business above stated, during a period of one (1) year from the date hereof Johnson Gasolene and Johnson Hi-Test Gasolene in accordance with the Requirements of the Buyer; and the Buyer agrees to pay therefor to the Seller in cash the tank wagon price of the Seller current at date and place of delivery.

Seller further agrees that in the event the total deliveries of gasolene purchased by Buyer hereunder shall in any one (1) calendar month amount to at least the quantities stated below, the Buyer shall be entitled to the following discount:

| DELIVERIES | DISCOUNT |
|---------------------------------------|--------------------------|
| Over 750 gallons per calendar month | $\frac{1}{4}$ c per gal. |
| Over 2000 gallons per calendar month | $\frac{3}{4}$ c per gal. |
| Over 3000 gallons per calendar month | 1c per gal. |
| Over 6000 gallons per calendar month | $1\frac{1}{2}$ per gal. |
| Over 10000 gallons per calendar month | 2c per gal. |

Payments of discounts will be made by check to the Buyer at the address named below on or before the fifteenth day of the month following any month on which such discounts may be due.

If at the end of the contract year the entire amount purchased under this contract shall equal at least the quantities shown below, a further discount will be determined at the following rates:

| DELIVERIES | DISCOUNT |
|------------------------------|-----------------------------|
| Over 9000 gallons per year | $\frac{1}{4}$ c per gallon |
| Over 24000 gallons per year | $\frac{3}{4}$ c per gallon |
| Over 36000 gallons per year | 1c per gallon |
| Over 72000 gallons per year | $1\frac{1}{2}$ c per gallon |
| Over 111000 gallons per year | 2c per gallon |

Any amount by which such discount shall exceed the total amounts that have been paid under the monthly discount provision of this contract shall then be paid to the Buyer.

Seller shall not be responsible for delays in delivery due to fire, floods and other acts of God, strikes or differences with workmen, accident to plant or machinery, partial or total failure of transportation facilities or other sources of supply or any other cause beyond seller's control.

Executed in triplicateSept. 27..... 1926

Recommended by

A. W. Alsen, Div. Mgr.

Bart Gillam

Buyer

The Seller shall not be obliged under this contract to sell and deliver to Buyer in excess of 10,000 gallons per year.

Address: Macomb, Illinois

Agreement is subject to cancellation by either party on ten days notice in writing to the other party.

JOHNSON OIL REFINING COMPANY

Attest: I. H. Johnson
Secretary

By James J. Johnson
Vice President."

As it appears from the averments in the bill of complaint, the appellees contend that they were induced to execute the lease referred to in the bill by fraudulent representation made to them

by the appellant, namely:

That in the fall of the year 1926, prior to September 27th, 1926, on several different dates and days, the Defendant Johnson Oil Refining Company sent its agents A. W. Alsen and H. L. McFadden to said farm for the purpose of fraudulently inducing these complainants to execute said lease and for the purpose of fraudulently inducing the complainants to erect a filling station on said real estate above described, and for the purpose of inducing complainants to enter into a contract with it to buy its gasoline hereinafter referred to as Johnson Gasoline, and re-sell the same at said filling station to the public, and of inducing the complainants to permit it, the defendant, to advertise the sale of Johnson Gasoline at such filling station when erected, and for the purpose of entering into a verbal contract with complainants hereinafter referred to:

That prior to September 27th, 1926, in conversation between these complainants and the said agents of the Johnson Oil Refining Company, a verbal agreement was entered into by the Johnson Oil Refining company on the one part, and Bart Gillam on the other part, in which the Johnson Oil Refining Company promised the complainant Bart Gillam that if he would erect a building and appurtenances thereto suitable for a filling station and buy Johnson Gasoline of it at its current tank wagon price and re-sell the same and no other gasoline at said station to the public at an advance price of two cents per gallon over said tank wagon price, and would permit them to advertise Johnson gasoline thereto to the public and would execute said lease, that it would sell to Bart Gillam Johnson Gasoline at the current tank wagon price and repay him Two (2) cents per gallon for each gallon of Johnson Gasoline so purchased and resold by him at said station during the term of said lease, so that he would thereby receive a profit of four (4) cents per gallon for all gasoline to be sold to the public at said station. And these complainants allege that said promises were made by the defendant fraudulently and were

made by it with the intent on its part at the time of making the same, not to perform the same and were made with the fraudulent intent on its part of obtaining said lease from these complainants and of inducing Bart Gillam to erect buildings and appurtenances on said real estate suitable for a filling station and for the purpose of advertising the sale of Johnson Gasoline and, until a profitable business of selling gasoline shall have been established by these complainants, and of then ousting the complainants from the possession of said premises and of appropriating to its own use the business and the good will of the business and of the filling station so erected and established by and through the labor and expenditure of money by and on the part of the complainant:

That in executing said lease the complainants relied upon said fraudulent promises and statements so made as aforesaid and believed the same to be true and so relying upon said false, fraudulent and untrue promises and statements signed said lease.

Also that they were induced by fraudulent representations of the appellant to execute the Tank Wagon Quantity Discount Contract, namely:

That at the same time lease was executed another and different contract in writing was executed by and between the same parties who executed said lease, to-wit: these complainants and the defendant, which contract is called and known as "Tank Wagon Quantity Discount Contract." That by the terms of said written contract and of said lease the said complainant was not to receive from the Johnson Oil Refining Company Two (2) cents per gallon for Johnson Gasoline sold by him at such station; and these complainants requested defendant to change said provisions in said lease and written contract to correspond with said verbal agreement so that their written agreement in relation thereto would show that the complainants were to receive Two (2) Cents per gallon from the defendant for gasoline sold at said station; and complainants aver that they stated to said agents of the defendant that they were fearful of signing said lease and written contract by reason of the



fact that the provisions of said lease and said contract were thus different from the terms of said verbal agreement; whereupon, the defendant, through its said agents, fraudulently represented and stated to the complainants that the Johnson Oil Refining Company did not want competing companies engaged in the same line of business that it was engaged in to know that it was paying or had agreed to pay to the complainant Bart Gillam (2) cents per gallon for Johnson Gasoline sold by him at said filling station, and that if such companies would find out it would cause the defendant trouble, and the said agents then and there fraudulently represented and stated that notwithstanding the lesser amount to be paid in the lease and written contract aforesaid, that the Johnson Oil Refining Company would nevertheless pay to the complainant enough in addition to the amount set forth in said lease and said contract to make up the difference so that he would receive from the Johnson Oil Refining Company the Two (2) Cents per gallon so agreed by it to be paid, as aforesaid, and that the Johnson Oil Refining Company would ignore all terms and conditions of said lease and written contract inconsistent or in conflict with the terms of said verbal contract.

The prayer of the bill is that said lease and said contract be declared to be of no force and effect; and that the same be cancelled as of no force and effect; and that the said lease, as the same appears of record of the Circuit Clerk, ex-officio Recorder of McDonough County, Illinois, may be ordered to be cancelled and removed therefrom as a cloud upon the complainant's title to the real estate described, and that said defendant be perpetually enjoined and restrained by the order and decree of the Court, from further prosecuting and proceeding in the suit at law; and that a preliminary injunction restraining and enjoining the said defendant from prosecuting and proceeding in said case at law, be issued; and that upon final hearing, the preliminary injunction may be made perpetual. And a preliminary injunction

was issued in accordance with the prayer of the bill. The appellant filed an answer denying the charges of fraud, fraudulent representations in the bill. The cause was referred to a Special Master to hear the evidence and report his conclusions. The Special Master heard the evidence and reported the same with his conclusions and findings. After hearing the case, the Special Master found that the appellees had failed to prove that there were any representations made by the **appellant or by its agent** which were falsely or fraudulently made, or made with the fraudulent intent on the part of the appellant not to perform the same; and that the appellees were not entitled to the relief prayed for in the bill, and that the bill should therefore be dismissed for want of equity.

Objections were filed to the Master's report, which were allowed to stand as exceptions thereto. Upon a hearing on the exceptions, the exceptions were sustained by the Court and the Court entered a decree making permanent the temporary injunction which enjoined the appellant from proceeding with and prosecuting the forcible entry and detainer suit referred to in the bill and pending in the Court at Law. The appellant prosecutes this appeal from the decree.

The charges of fraud and fraudulent representation set forth in the bill of complaint are the basic matters in this controversy. The Appellee, Bart Gillam, states concerning these matters that a verbal **agreement was made prior to the execution of the lease** in question; that the appellant represented that he, Gillam, would realize on all the gasoline sold at the station in question, the sum of four cents per gallon, and for a term of ten years. It appears from the evidence, however, that in the verbal negotiations between appellant's agent and the appellee Gillam it was agreed that the appellee would realize the profit of four cents per gallon for the gasoline sold to him, but nothing was said by appellant's agent, nor agreed upon in the negotiations, as to the length of time that Gillam would realize the profit of the amount stated, nor that the appellant would arrange or provide in a lease to be thereafter executed that Gillam would realize the **profit of**

four cents per gallon for the entire term of the lease, and there is no evidence in the record to the effect that the appellant induced Gillam to sign the lease or the tank wagon quantity discount contract by false or fraudulent representations. On the contrary, the evidence shows that the lease and the tank wagon quantity discount contract, which were prepared by the appellant to carry into effect as the result of the negotiations between the parties, were submitted to the appellee Gillam and that he took the same under advisement, and that he had the advice of counsel concerning the advisability of his executing same; and that after he and his counsel had considered the same in detail, the only objection made by Gillam to the terms of the lease pertained to two of the clauses in the lease which he insisted should be stricken out, and they were stricken out of the lease; and that thereupon the lease was accepted by Gillam and was thereafter executed by him, as well as the Tank Wagon Quantity Discount Contract. The Tank Wagon Quantity Discount Contract is the same that the appellant made with all the handlers of its gasoline and oil at all its stations. Under the tank wagon quantity discount contract, Gillam was to realize a profit of four cents a gallon for the gasoline handled by him at his station. It also appears from the evidence that Gillam operated his station under the terms of the tank wagon quantity discount contract for a period of over two years; and no disagreement or controversy arose between the parties with reference thereto until the appellant notified Gillam, under the terms of the lease, as well as the tank wagon quantity discount contract, that it would be cancelled and a new contract proposed by appellant in reference to the purchase price and sale of the gasoline to be handled at the Gillam station. Thereupon the dispute arose between the parties from which the forcible entry and detainer suit against the appellees resulted, and afterwards the present litigation.

The evidence in the record clearly discloses not only that there was no fraud nor fraudulent representations nor any fraudulent intent on the part of the appellant in connection with the making of the lease and the tank wagon quantity discount contract which were the result of the negotiations between the parties; but

also that the negotiations were carried on and completed in a deliberate and businesslike way by both parties; and that the appellee acted with a full knowledge and understanding of the subject matter of the lease and of the tank wagon quantity discount contract, and the obligations assumed by the terms of the lease and the contract referred to.

It is well settled law, that oral negotiations or verbal agreements of parties to a written lease, before or at the time of making the written lease, are all merged in the written lease. **Hartford Deposit Co. v. Rector**, 190 Ill. 380. The rights of the parties involved in a forcible entry and detainer suit concerning the possession of the leased premises must be adjudicated in accordance with the terms and the conditions contained in the written lease. **Brubb v. Milan**, 249 Ill. 456. **Hoefeld v. Ozello**, 290 Ill. 147. **Sterling-Midland Coal Co. v. The Great Lakes Coal & Coke Co.** 334 Ill. 281.

For the reasons stated, we conclude that the Court erred in sustaining the exceptions to the report of the Special Master and entering a decree making permanent the temporary injunction and restraining the prosecution of the forcible entry and detainer suit by appellant, which are pending for trial. The decree is therefore reversed and the cause remanded with directions to dismiss the bill for want of equity.

Abstract
Opinion filed May 11, 1932
Rehearing denied - October 4, 1932

2 A

267 I.A. 629¹

General No. 8564

Agenda No. 3

January Term, A. D. 1932

WILLIAM L. JAMES, Appellee,

vs.

MOTOR TRANSIT MANAGEMENT COMPANY, a

Corporation, Appellant.

Appeal from Circuit Court, Logan County.

ELDREDGE, J.

Appellee recovered a judgment against appellant in the Court below in the sum of \$8,000.00, to reverse which this appeal is prosecuted. This is the second appeal. On the first appeal we discussed the alleged errors therein presented upon the record of that trial. **James v. Motor Transit Management Co.**, 260 Ill. App. 246. Since the first trial appellee, by leave of Court, filed two additional counts to the declaration, in the first of which it is alleged that appellant carelessly and negligently failed to provide said motor bus with a sufficient quantity of gasoline and that by reason thereof said bus came to a stop and was left upon the concrete pavement on said Route 4 at a point two miles north of Elkhart, and by reason of said negligence was there left standing with the left rear end projecting out and obstructing substantially all of the

east lane of said pavement and that about nine o'clock P. M., while the night was dark and rainy and the air filled with mist, and while plaintiff was exercising due care in driving his certain car northward upon said pavement, he came into collision and contact with said motor bus and sustained injuries, etc.

In the second additional count it is alleged that the defendant carelessly and negligently and in violation of the statute allowed its motor bus to stand upon the concrete surfaced right of way of Route 4 without a good and sufficient light upon the rear end of said bus to give warning of its position and without posting any person with a light, flag or other means of warning at the rear of said bus to warn approaching persons of its presence, and that while plaintiff was driving north, exercising due care for his own safety, he collided with said bus.

In our former opinion we discussed the evidence as it then appeared in the record. On the second trial it was substantially the same with the exception that appellee introduced the testimony of two additional witnesses, one of which was the witness Buttell who testified that on the night in question at about nine o'clock P. M. was driving from Elkhart

north on the highway in an automobile; had a windshield wiper on his car but did not recollect whether it was working that night or not; when he first observed the bus he was 200 feet distant from it; he saw the bus through the windshield of his car but don't remember whether there was any mist on the windshield, it was a misty night; that he paid no particular attention to the bus any more than to just notice whether he could see anyone around there; the headlights from the bus were thrown upon the C. & A. R. R. Co. grade and the reflection thereof upon the grade is what he first noticed; did not notice how many lights there were on the bus nor whether there were any on the back of the bus; that he didn't pay any attention to the lights.

The other new witness, McGough, testified that he lived in Lincoln and was deputy sheriff; that he drove past the bus about 8:45 P. M. while returning from Elkhart with his wife and some others; that there were about four feet of the east traffic lane occupied by the bus but did not make any examination as to how far it was from the black line; that he did not recall that there were any lights on the back of the bus; he had a windshield wiper but don't remember whether it was in operation or not. On cross examination he stated that he had been in

the court room during the former trial but did not testify; he had no recollection of noticing any lights on the bus, if they were burning they were very dim; there were no lights burning on it; that he slowed down when he saw the bus in front of him; that he had no trouble so far as he was concerned in seeing it; that he saw it probably 25 yards away; there were no headlights burning on the bus, no lights at all; that he was driving about 30 miles an hour; the weather was a little misty but don't remember whether it was raining; there was some fog which was fairly heavy as he remembered; that he was able to see ahead through the fog for 30 or 35 yards.

We reversed the first judgment because the verdict was contrary to the manifest weight of the evidence. The testimony of these two additional witnesses adduced at the last trial but strengthens our former views in this regard. While the absence of lights on the bus might be negligence, and the evidence is very conflicting on this point, yet, unless such absence was the proximate cause of the injury appellee cannot recover. Every witness in the case, with the exception of appellee and his companion in his automobile, testified that they saw the bus at approximately the time of the accident,

some before and some afterwards, in ample time to pass it in safety. No witness testified that in passing the bus that he had to drive off the concrete pavement of the southbound lane. Consequently the bus could not have stood at any great distance over the center of the concrete, and, in any event, none of these witnesses testified that they had to drive onto the west shoulder in order to pass the bus. As stated in our former opinion some of the witnesses testified there were lights on the rear end of the bus, others that they did not see or did not pay enough attention to remember whether there were any or not. Even the testimony of the two additional witnesses produced on the last trial is in direct conflict. One says the headlights of the bus were burning while the other states that they were not, but the main fact is uncontradicted, except by the plaintiff and his companion, that the bus could be plainly and was easily seen by numerous people who passed the same immediately before and after the accident. We cannot shut our eyes to the plain facts shown by the record.

One of the instructions given by the Court on behalf of the plaintiff in substance charged as a matter of law that if the jury believed from the evidence that the defendant

negligently suffered said motor coach to stand on the concrete roadway of the east traffic lane of said highway and to obstruct a large part of said lane, and if they further believed from the evidence that the night was dark, rainy and misty and thereby it was difficult to see objects upon said highway and that the exercise of due care and diligence on the part of the defendant to avoid injury to persons traveling northward upon said highway required that the defendant give warning or notice of said condition and position of said motor coach upon said highway by having some person or persons stationed in the rear of the same to give notice or warning of the same, and that the defendant failed to do so, and that it was guilty of negligence in failing to do so, and that the plaintiff was driving northward on the east side of the highway toward the place where the motor coach was so standing and was then and there in the exercise of ordinary care for his own safety, and that by reason of such negligence of the defendant, if any, the motor vehicle driven by the plaintiff came into collision with the motor bus, then they would find the issues in favor of the plaintiff. We know of no rule of law which requires a driver of a motor car upon a public highway, who has to stop thereon on account of some

emergency happening to said car, to station some person at the rear end of the same to give such warning. If the night was too dark for the plaintiff to have seen this motor bus by the exercise of due care in time to have avoided a collision, then any person stationed at the rear of the motor bus would also have been invisible to the plaintiff, and in many cases such a duty would be impossible to comply with.

In another instruction given on behalf of the plaintiff the jury were instructed as a matter of law that if they believed from the evidence that the defendant carelessly and negligently failed to provide for said motor bus a sufficient quantity of gasoline and that by reason thereof the said motor bus came to a stop and was left upon the concrete pavement, and that the plaintiff was driving his automobile northward upon the east lane of said pavement in the exercise of ordinary care for his own safety, and that by reason of the aforesaid negligence of the defendant the collision occurred, then they should find the issues for the plaintiff. Every driver of an automobile must necessarily use his judgment as to the distance his car can proceed upon the amount of gasoline carried therein. This motor bus had but five miles to go to reach the City of Lincoln

when it was compelled to stop for want of gasoline. It can not be held as a matter of law that, because the driver of the motor bus erred in his judgment as to the amount of gasoline which was necessary to propel his car to a certain destination, he was thereby guilty of negligence. Under this instruction the jury are told that the defendant was guilty of negligence if the motor bus had to stop on the state highway on account of a deficiency of gasoline and if the plaintiff, while exercising due care, drove his car into the motor bus, then the defendant is liable regardless of whether the motor bus was clearly visible to anyone approaching it or on account of any other conditions which might have prevailed.

Under these two instructions the jury could not have done otherwise than have rendered a verdict for the plaintiff. Each one directs a verdict and each is clearly erroneous.

For the errors above mentioned the judgment is reversed and the cause remanded.

*See Deam
v. Hayes*

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STATE OF ILLINOIS. **FILED**
APPELLATE COURT.
FOURTH DISTRICT. JUN 24 1932
MAY TERM, 1932. *Robert B. Noel*
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 16.

AGENDA NO. 9.

THE PEOPLE, ex rel.,
Petitioners,

VS.

THOMAS J. HAYES, Jr., et al.,
Defendants.

267 I.A. 629²

CERTIFICATE OF QUESTIONS OF
LAW FROM CITY COURT OF EAST
ST. LOUIS.

EDWARDS, J:- The City of East St. Louis, which operates under the Commission Form of Government Act, filed its petition for mandamus in the City Court of said city, against the defendants, as members of and Chief Clerk of the Board of Election Commissioners of such city, to require them to conduct a special election for the purpose of electing a Judge of the City Court of said city, to fill a vacancy therein caused by death of Judge Silas Cook.

General and special demurrers were filed to the petition. The court sustained the demurrers, and dismissed the petition. The parties, by the certificate provided for by Section 104, Chapter 110, Smith-Hurd R. S., 1931, bring before this court, for review, the questions of law decided by the trial court, upon which its decision was rendered.

Such questions, three in number, are:

First: "Shall an election to fill a vacancy in the office of Judge of the City Court, be held in conformity with the Commission Form of Government Act, which provides for a primary election, and an election; the primary to be called after fifty days, and an election to be held seven weeks after the date of the primary, with the candidates for election to be the two candidates who polled the highest number of votes, respectively, in the primary, and which names shall be placed on the election ballot in alphabetical order?"

Second: "Shall an election be held to fill a vacancy in the office of Judge of the City Court, without recourse to the Commission Form of Government Act, and also, shall such election be held without a primary election; the said election being in conformity with the Ballot Law, i. e. Chapter 46, Sections 688 et seq., Smith-Hurd, 1931, and the provisions of the Cities and Villages Act of 1872, Chapter 24, Section 64, Smith-Hurd, 1931?"

Third: "If such special election is not governed by the Commission Form of Municipal Government Act, does the General Primary Act, Chapter 46, Sections 365, et seq., Smith-Hurd, 1931, govern the nomination of candidates to be voted for in said special election?"

The Court held that in filling such vacancy in the City Court Judgeship, neither the provisions of the Commission Form of Government Act, nor the provisions of the General Primary Election Act, had application, but that "an election to fill a vacancy in the office of Judge of the City Court shall be held in conformity with the provisions of the Ballot

Law." We are asked to review the several holdings of the trial court.

In *Dashney v. Hayes, et al.*, Agenda No. 8, in which opinion was filed this day, we passed upon the legal propositions involved in this case. For the reasons therein stated, we are of opinion that the provisions of the Commission Form of Government Act, control in the case of electing a Judge of the City Court to fill a vacancy therein, in a city which is operating under that form of government, and that such election cannot lawfully be held under the General Ballot Law, in conjunction with the Cities and Villages Act of 1872. It is also our conclusion that the General Primary Election Act does not govern the nomination of candidates to be voted for in such elections.

The court rightly held that the General Primary Act had no application to such elections; but erred in holding that the General Ballot Law, in conjunction with the Cities and Villages Act of 1872, controlled in the conduct of same. The Court likewise erred in holding that a special election, to fill a vacancy in the office of Judge of the City Court, cannot be held under the terms of the Commission Form of Government Act, in a city which has adopted, and operates under, the provisions of such Act.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

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STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FILED

SEP 18 1932

MAY TERM A. D. 1932.

NOV
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 1.

AGENDA NO. 1.

PEOPLE OF THE
STATE OF ILLINOIS,
Defendant in Error,

V.

IRENE HENDERSON,
Plaintiff in Error.

267 I.A. 629³

ERROR TO BOND COUNTY
COURT.

BARRY, P. J:- An information was filed against plaintiff in error, her daughter Pauline Burke, her son Louis Henderson and Willard Hubbard for an alleged violation of the Prohibition Law. The information was nolleed as to Pauline Burke and the other defendants were found guilty of unlawful transportation of intoxicating liquor.

The evidence upon which plaintiff in error was convicted consists of alleged declarations of her son. The sheriff testified that Louis Henderson told him at some time after his arrest, that the liquor found by the sheriff was his mother's and that he took it to the garage where it was found, in a car from his mother's home, or words to that effect. The alleged declarations were not competent evidence against plaintiff in error. She was not present at the time they

TERM NO. 1.

were alleged to have been made. There was no other evidence tending to show that her son was her agent in moving the liquor, or that the liquor belonged to her. Even if the son had been shown by competent evidence to have acted as her agent in moving the liquor his alleged admissions, or declarations on a subsequent day would not be competent evidence against her. There is no legal evidence even tending to show that plaintiff in error was guilty of the offense charged against her. The judgment is reversed.

Not to be reported in full.

REVERSED.

A

114

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FILED

SEP 18 1932

Walter B. Roy
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

MAY TERM, A. D. 1932.

TERM NO. 10.

AGENDA NO. 16.

JAMES M. THOMPSON, et al,
Appellants.

V.

JOHN L. DOUGLASS, et al,
Appellees.

267 I.A. 629⁴

APPEAL FROM GRANITE CITY,
CITY COURT.

BARRY, P. J:- The Mirific Products Company was incorporated under the laws of Illinois with a capital stock of \$50,000.00, five hundred shares of the par value of \$100.00 each. The incorporators received 250 shares of the stock for services rendered and to be rendered in the following proportions: James M. Thompson, 50 shares; R. F. Hodge, 75 shares; John L. Douglass, 50 shares; A. H. Grupe, 20 shares; M. Sutter, 55 shares. Those parties entered into a written agreement whereby they placed the said shares in the Granite City National bank in escrow, until, by a majority vote of the Board of Directors, the same may be returned to the respective owners. They proceeded to sell other stock to such of the public as could be induced to

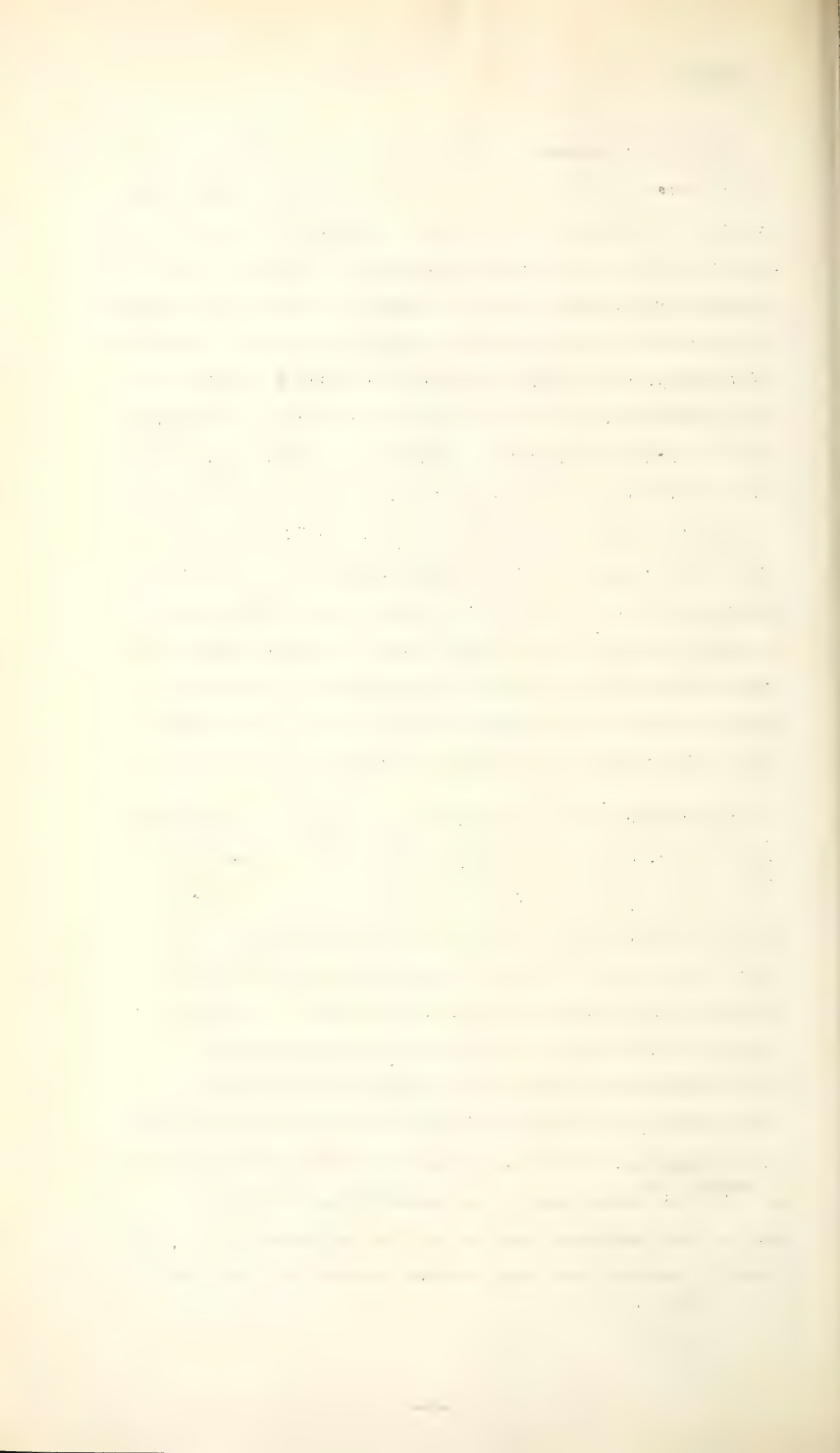
purchase the same, in order to provide a working capital. James M. Thompson and John L. Douglass became the active and leading spirits in the enterprise. Their relations were very friendly and for a time they purchased other shares of stock with the view of obtaining enough stock to control the corporation. Some trouble arose between them in 1929 and on September 12, 1930 appellants filed the bill in this case.

Since the filing of the bill some of the matters in controversy have been adjusted by stipulation and agreement. For that reason it is unnecessary to set out the various allegations of the bill. Mr. Sutter filed a cross-bill in which he averred that he sold fifty-five shares of stock to the corporation in 1925 and that the sale was induced by false and fraudulent representations and that by reason thereof he was entitled to a return of the stock upon payment by him to the corporation of the purchase price, which was \$550.00. The decree was in favor of Mr. Sutter and it also determined what stock had been lawfully issued and the ownership thereof, etc.

Appellants insist that the Court erred in granting to Mr. Sutter the relief prayed in his cross-bill. He sold fifty-five shares of stock to the corporation on May 5, 1925 for \$550.00. He filed his cross-bill on November 4, 1931, more than a year after the filing of the original bill. He never, at any time prior to the filing of his cross-bill, attempted to rescind the sale. He made no showing as to when he learned that his stock had been procured by fraud. So far as the record shows he may have learned all of the facts now relied upon the day after the sale was made. He did not file his cross-bill until after Mr. Douglass told him that he would probably get his stock back by making a demand for it.

There is no competent evidence that Mr. Sutter was induced to sell his stock through false and fraudulent representations. He testified that the only representations made to him were made by appellee, Huelsick; that Huelsick told him that Mr. Thompson, Douglass and some more of them agreed to reduce their stock and that they were buying up stock for the Company. He was then asked:- "Q.- Well, Mr. Sutter, did you surrender your stock and turn it back into the Company upon the understanding being conveyed to you by Mr. Huelsick that Mr. Thompson, Mr. Douglass and others were also going to turn in their stock?" And he replied:- "Yes." He was then asked:- "Q.- If you had known Mr. Thompson or Mr. Douglass were not going to surrender their stock, would you have turned in your stock?" And he replied:- "No sir." The questions were objected to and were very leading and suggestive and the witness did not relate any conversation that would warrant the conclusions stated in his answers.

Mr. Huelsick did not testify as to what his conversation was with Mr. Sutter, but simply stated that he explained the whole thing to him and acquired the stock at \$10.00 per share. Mr. Sutter says that no misrepresentation was made to him as to the value of his stock. The evidence is wholly insufficient to entitle Mr. Sutter to rescind and the Court erred in awarding him any relief under his cross-bill. We think it is a fair inference, from the evidence, that Mr. Sutter was entirely satisfied with the transaction until Mr. Douglass suggested to him that he ^{might get} his stock back if he demanded it. We think it also a fair inference that he and Mr. Douglass were friendly and that Mr. Douglass was anxious to have Mr.



TERM NO. 10.

Sutter get his stock back so that Mr. Douglass would have the support of Mr. Sutter in electing a Board of Directors.

Appellees assign cross-errors. They insist that some of the stock purchased from other stockholders by Mr. Thompson, his wife, Mr. Douglass and others was not lawfully purchased. Their contention in that regard is based upon an alleged by-law which reads as follows:- "The Company has the option of buying any shares offered for sale and must be notified ten days before sale can be made. Should the Company decline to purchase shares they may be sold on the market."

Appellees averred in their answer that upon the organization of the Company a set of by-laws was prepared for it which was never formally adopted, but nevertheless was inserted in the minute book of said corporation and were treated and regarded at all times thereafter by all persons interested, including said Thompsons, as the duly constituted by-laws of said corporation; that said Thompsons and other stockholders, directors and officers are estopped from questioning the validity of such by-laws.

The undisputed evidence is that before any trouble arose between Mr. Thompson and Mr. Douglass, sixty-eight shares of stock had been purchased by them, each of them buying thirty-four shares. Later Mr. Douglass purchased three other shares. Elmer Paradise purchased twelve shares from other stockholders and George A. Morrissey, five shares. Caroline Douglass and Martha Vaughn purchased from Mr. Douglass ten of the fifty shares issued to him. All of the above mentioned purchases of stock from other stockholders were made and the transactions completed with-

out the sellers first giving the corporation the option to purchase in accordance with ^{the} terms of the alleged by-laws.

So far as the record shows no stockholder invoked the alleged by-law until Mr. Thompson's wife purchased from R. F. Hodge and A. H. Grupe the 95 shares which were originally issued to those persons. Prior to that purchase Mrs. Thompson was not a stockholder in the corporation and the certificates of stock contained no restriction whatever upon sales thereof.

The Statute provides that the directors of a corporation shall "Adopt, alter, amend or repeal the by-laws." Cahill's Ill. ch. 32, par. 21. The record shows that no by-laws were ever adopted by the board of directors. There were two sets of by-laws. The first set was clearly intended as nothing more than a form. Many of the provisions were in the alternative and there were a number of blanks that were never filled. The second set is the one upon which appellees rely but it does not even contain the name of the corporation. Appellees utterly failed to prove the averments of their answer that the alleged by-law in question was treated and regarded at all times, by all persons interested, as a duly constituted by-law of the corporation.

Mr. Douglass testified that the ten shares of stock now held by Caroline Douglass and Martha Vaughn are a part of the fifty shares originally issued to him. He also testified that he purchased thirty-seven shares from other stockholders. There is no evidence that he purchased more than that number. He now holds forty of the fifty original shares issued to him and the thirty-seven he purchased from other stockholders, making a total of seventy-seven shares.

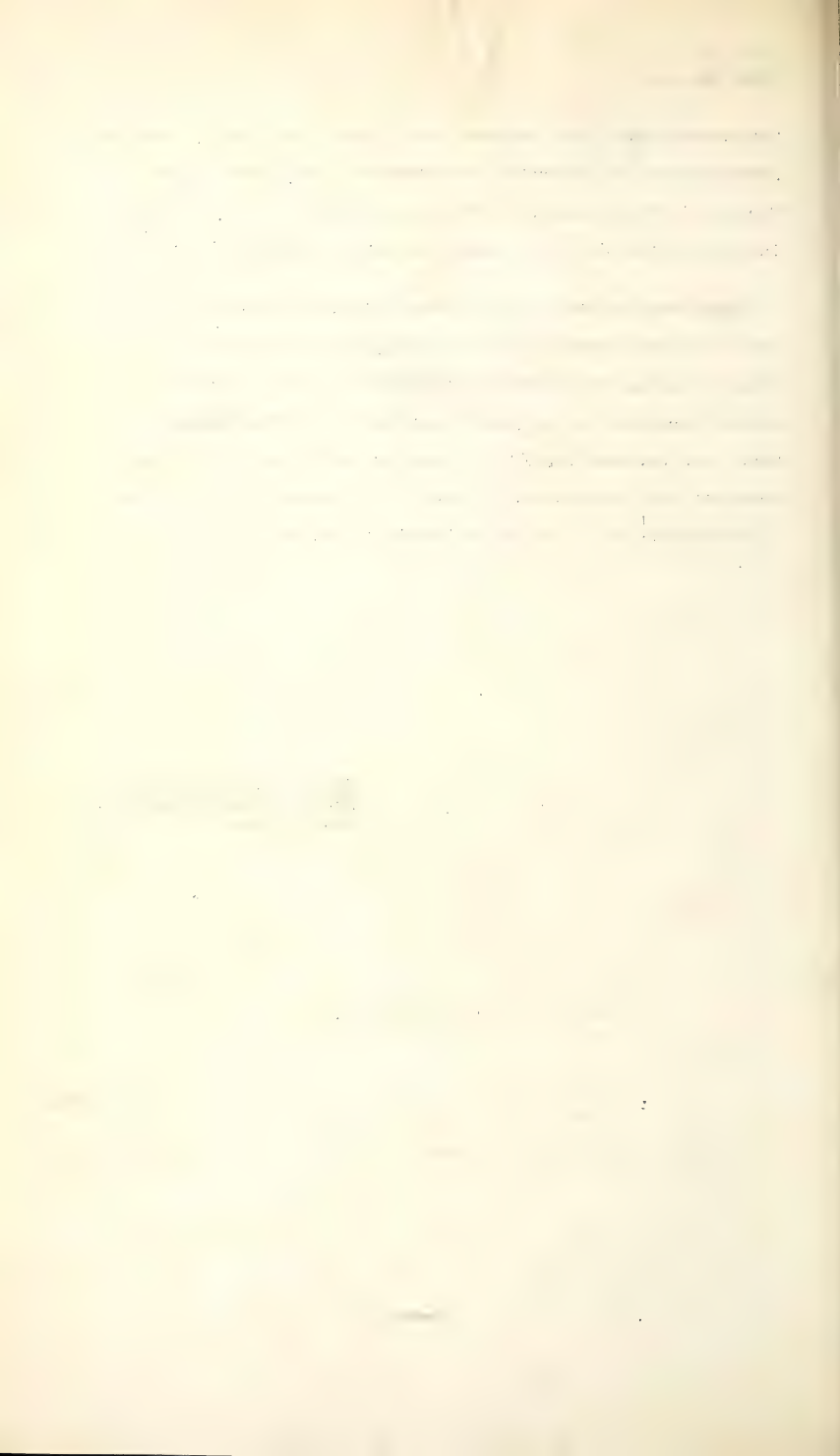
TERM NO. 10.

The decree finds and declares that he is the owner of eighty-seven shares. No objection or exception was taken to the finding in that regard and the question has not been raised in this Court. For that reason we can do nothing about it.

Appellees contend that the Court erred in requiring that they pay one-half of the costs, but the contention is without merit. The decree is affirmed in all respects except in-so-far as it grants any relief to Mr. Sutter under his cross-bill. It is therefore affirmed in part and reversed with directions to amend the decree in that regard in accordance with the views herein expressed.

DECREE AFFIRMED IN PART
AND REVERSED IN PART WITH
DIRECTIONS.

Not to be reported in full.



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115

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FILED

SEP 19 1932

MAY TERM, A. D. 1932.

Sept 15 Nov
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 15.

AGENDA NO. 19.

267 I.A. 629

WAVYZELLE ABNER,
Appellee.

V.

GREGOR SIDO,
Appellant.

APPEAL FROM GRANITE CITY,
CITY COURT.

BARRY, P. J.:— In Granite City, State and Twenty-seventh streets cross at right angles. State runs north and south, and Twenty-seventh runs east and west. In the block west of the intersection there is but one house on the south side of Twenty-seventh street and it is about 140 feet west of State street. In the block south of the intersection there is but one house on the west side of State street and it is 450 feet south of Twenty-seventh street. Along the west side of State street in that block, the land is thirty inches higher than the pavement on State street. On November 28, 1930, appellee was driving east on Twenty-seventh street and reached the intersection between five and five-twenty P. M. Appellant was driving north on State street and the cars collided on the intersection. Appellee sued to recover for



personal injuries and secured a verdict and judgment for \$2500.00.

Section 53 of the Motor Vehicles Act, gave appellant the right of way at this intersection, but that does not mean that he was entitled thereto regardless of circumstances and conditions. The great weight of authority is to the effect that a vehicle is approaching an intersection from the right within the meaning of the Statute, and entitled to the right of way, when, on its left, on an intersecting street, another vehicle is approaching, whose driver, in the exercise of due care, would or should see that unless he yields the right of way the vehicles might or would collide.

The substance of the testimony of appellee as to how the accident occurred, is as follows:- On the evening in question appellee turned east on Twenty-seventh street three blocks west of the intersection. She says that from the time she turned east until the cars collided she was driving about fifteen miles per hour with all of her lights burning. When about 125 feet west of the intersection she says she looked south and saw appellant's car coming north on State street and it was then about 450 feet south of the intersection, but she didn't observe its speed, and that she didn't see the lights on his car because of the embankment. After seeing appellant's car at that point she says she continued to approach the intersection at the same speed and didn't look to the south again except that when she was eighteen or twenty feet from the center of the intersection she glanced south but did not see appellant's car. When she glanced south at that time she had reached the west line of State street. She says she then drove onto the intersection



TERM NO. 15.

at the same speed and when the front wheels of her car were about over the center of State street she saw appellant's car, that it was lighted and it was thirty or thirty-five feet south of the the south curb of Twenty-seventh street. She says that her car then moved about five feet and the collision occurred. In the brief interval in which she saw the car before the collision, she says appellant was driving forty-five or fifty miles per hour.

The undisputed evidence is that the embankment which she says prevented her from seeing the lights on appellant's car, is but thirty inches higher than the pavement on State street. It is undisputed that a man standing on Twenty-seventh street, twenty feet west of the center of the intersection, can see all of the pavement on State street for nine hundred feet south of the intersection. From a point fifty feet west of the center of the intersection he can see the east half of the pavement on State street for 150 or 175 feet south of the intersection. Appellee saw appellant's car when she was about 125 feet west of the intersection. She did not observe the speed of his car. There is no question but that if she had looked she could have seen his car at all times while she traveled that 125 feet. She knew his car was approaching the intersection, ^{yet} and she drove 125 feet without again looking to see where it was or at what speed it was going. When she reached the west side of the intersection she says she glanced to the south but did not see appellant's car. There was nothing to obstruct her view and she offered no excuse for not seeing it. It clearly appears that she entered upon the intersection without making any observation as to where appellant's car was or



the speed thereof. There is no escape from the conclusion that if she had exercised ordinary care for her own safety she would have seen that unless she yielded the right of way the vehicles might or would collide. That being true she was guilty of contributory negligence which proximately caused her injury. That is our conclusion from a consideration of her own testimony.

Appellant says that he was driving north on State street with his headlights burning, at about twenty or twenty-five miles an hour, and when about one hundred feet south of Twenty-seventh street he applied his brakes slightly and slowed down to about eighteen miles an hour. He then saw a car approaching from the west on Twenty-seventh street about four or five hundred feet west of the intersection, and the headlights on that car were lighted, and as he got ready to go over the intersection he again looked to the west and saw the same car and it was then about a block west of the intersection. That there was no other car, with headlights burning, west of the intersection at that time. He says that when he was about three-fourths of the way across the intersection he again glanced to the left and saw appellee's car for just an instant before the collision and that appellee had no lights on her car. The lighted car, which appellant says he saw west of the intersection, was driven by the witness Schinazi. That witness says that when he was two blocks west of the intersection, he saw appellant's car about 450 feet south of the intersection, and that the headlights on appellant's car were burning. He also testified that appellee passed him six hundred or seven hundred feet west of the intersection and that when

TERM NO. 15.

she did so he observed that neither the headlights nor the tail light on appellee's car were lighted and that appellee was driving forty or forty-five miles an hour.

We find no evidence in the record legally tending to prove that just prior to and at the time of the collision appellee was in the exercise of due care and caution for her own safety. The Court should have allowed appellant's motion for a directed verdict and it is our duty to reverse the judgment with a finding of facts. American National Bank v. Wollard, 342 Ill. 148-157.

REVERSED.

The clerk will insert in the judgment the following: "The Court finds that appellee was guilty of contributory negligence which was a proximate cause of her injuries."

Not to be reported in full.

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STATE OF ILLINOIS.

APPELLATE COURT.

FOURTH DISTRICT.

FILED

SEP 19 1932

Robert S. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

MAY TERM, A. D. 1932.

TERM NO. 21.

AGENDA NO. 23.

267 I.A. 630'

RINARD BANKING COMPANY,
Appellee,

V.

H. J. CUNNINGHAM, et al,
Appellants.

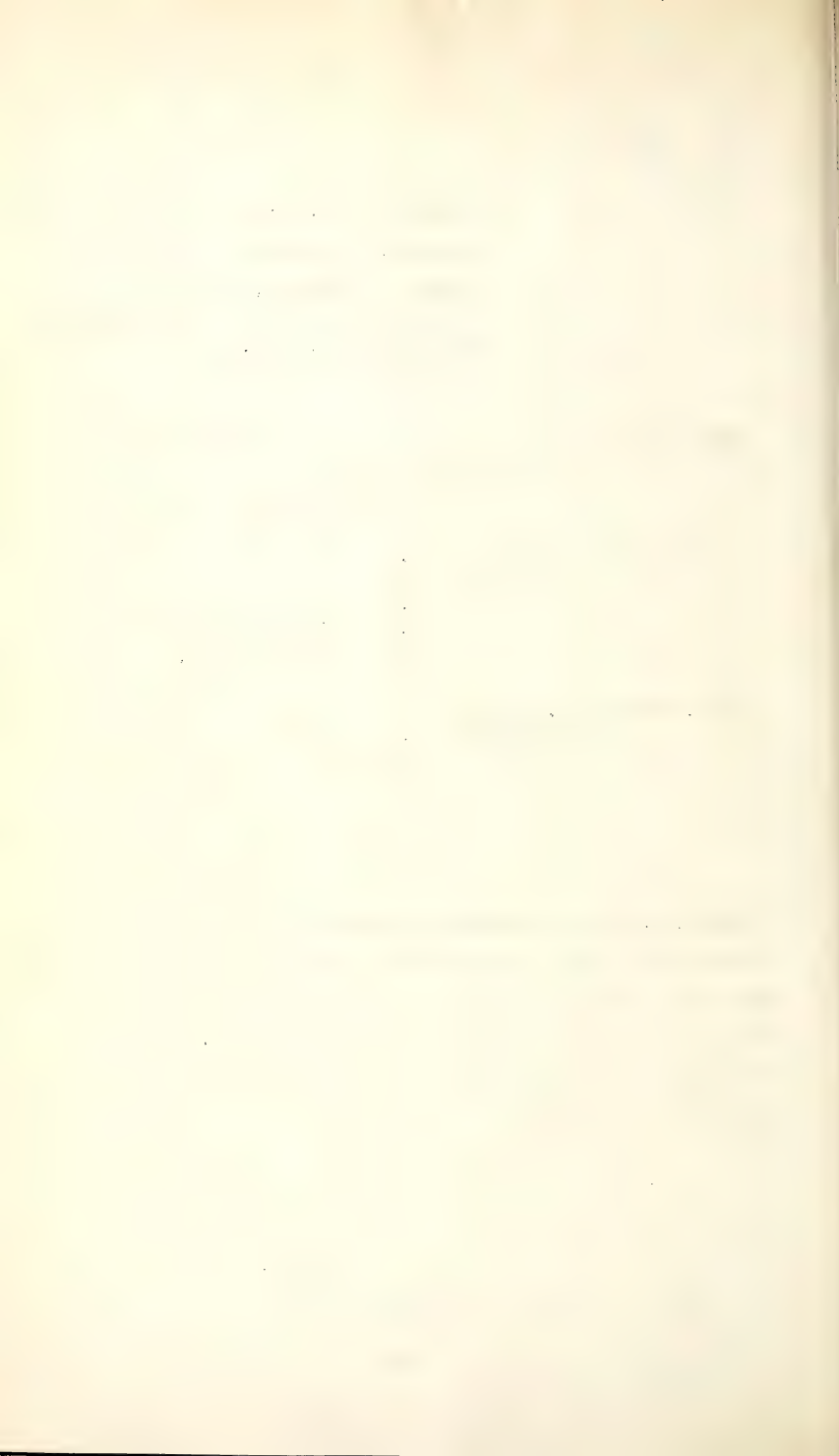
APPEAL FROM WAYNE

CIRCUIT COURT.

BARRY, P. J:- The questions involved in this case are identical with those in First National Bank v. H. J. Cunningham, et al, and the opinion this day filed in that case is controlling in the case at bar. The decree, in-so-far as it affects the rights and interests of Zelma Cunningham, is reversed.

REVERSED.

Not to be reported in full.



STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

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FILED

SEP 10 1932

MAY TERM, 1932.

Walter S. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 3.

AGENDA NO. 3.

JOHN MANN,
Appellant,

VS.

SERETTA MANN,
Appellee.

267 I.A. 630²

APPEAL FROM CIRCUIT COURT
OF
WAYNE COUNTY.

EDWARDS, J:— On April 20, 1919, Seretta Mann, appellee, and John Mann, appellant, were married. They lived together until 1926, when they separated for a short time, after which they were reconciled and resumed cohabitation until 1927. During that year she again left the home, filed a bill for divorce, alleging cruelty, and once more they composed their difficulties, living together until July 23, 1931. On the last mentioned date she, for the third time, left, and shortly thereafter instituted this suit. Two children were born of the marriage; a boy now of the age of nine years, and a girl of five.

The bill charges extreme and repeated cruelty. Appellant

TERM NO. 3.

answered the bill, filed a cross-bill charging appellee with adultery, and also that she, in conspiracy with one Bart Kinney, attempted the life of appellant. The cross-bill was answered, and the cause heard before the chancellor, who decreed appellee a divorce as prayed for in her original bill, awarded her the custody of the children, subject to the father's right of visitation; also made her an award of alimony, and dismissed the cross bill. Appellant has prosecuted this appeal, asserting that the proof did not justify a finding that he had been guilty of extreme and repeated cruelty; that the evidence established the fact that his wife had committed adultery with Kinney, and that the two had attempted his life by poisoning.

The only questions raised are the sufficiency of the proof to justify the chancellor's findings. We shall consider them in the order in which they are argued.

Appellee testifies to many acts of physical violence, which she states were inflicted upon her by appellant, such as striking her with his fist, whipping her with a wet cloth, pinching her limbs until blue marks showed, knocking her off a table when she was cleaning an electric light fixture, beating her upon the arm with a granite wash pan, and threatening to kill her. She is corroborated, as to a part of such acts, by the testimony of Russell Mann, the nine year old son of the parties, who testified fully as to witnessing the episode when she said she was knocked off the table by appellant; also as to his striking her with the wash pan. She is further supported by the testimony of Susan Owens, her aunt, who stated that

TERM NO. 3.

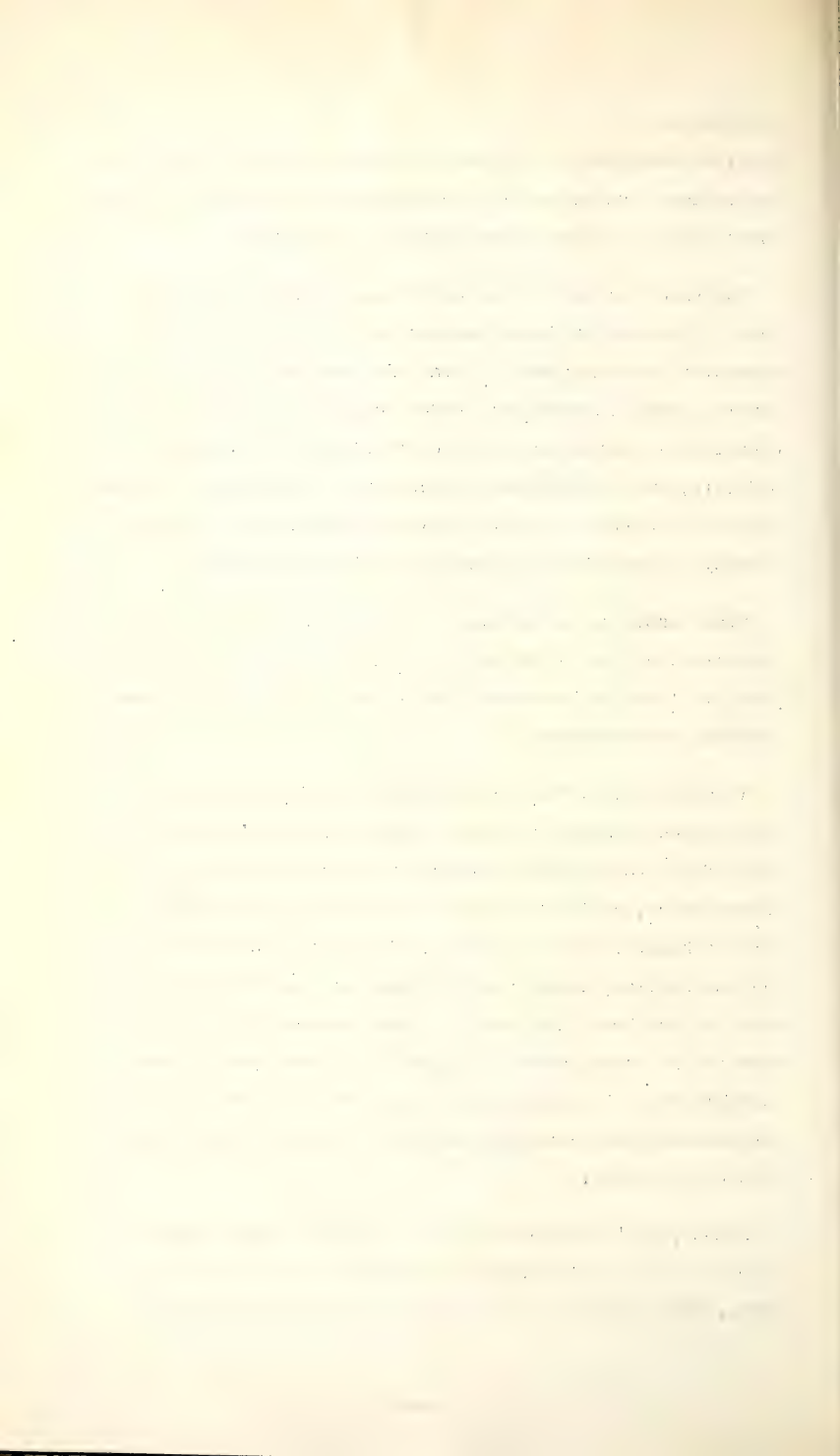
appellee exhibited to her the blue marks upon her limbs, which she claimed were caused by the violence of appellant. All of these acts of violence were denied by the latter.

The proof on the part of appellee, if true, established acts of physical violence towards her, by appellant, of a character producing bodily harm, and were sufficient to put her in personal danger and render cohabitation unsafe. This constitutes extreme and repeated cruelty. *Lipe v. Lipe*, 327 Ill., 39. We think the chancellor was warranted in finding that appellant had been guilty of extreme and repeated cruelty as charged in the original bill of complaint.

Much testimony was adduced by appellant to sustain his allegation of the wife's adultery, and the claimed attempt upon his life. The evidence upon these matters was circumstantial and voluminous.

It appears that the Mann residence was located upon a state paved highway, the house being back from the road about fifty feet. That there was much traffic over this thoroughfare, at least one car passing every minute. That about a hundred yards from the dwelling was a store and filling station, largely patronized, and that from the store to the house the view was unobstructed. That in the rear of the house, about one hundred and twenty-five feet distant, was a building, used by one Tice as a cleaning and pressing establishment, and which likewise had a clear view of the house.

Kinney, the co-respondent, was a married man, who lived about a mile from the Mann residence. He was a barber by trade, who operated his business at his home. Appellant was



TERM NO. 3.

a patron of Kinney, visiting him for tonsorial service once or twice a week. The latter purchased butter and milk from the Manns, coming for same every day or so. The families were friendly and visited back and forth. Kinney had worked some with appellant in the grading of roads.

Much testimony was introduced to show that Kinney visited/^{the} Mann residence frequently, in the absence of appellant, and remained for considerable periods. All such testimony discloses, however, that he went there openly, and in the day time, with no attempt at concealment.

It further appears that in the Mann residence there was a pump, where men of the neighborhood were accustomed to go for a drink of water, entering unannounced through the unlocked kitchen door. That on two occasions men so entering, found appellee and Kinney in the house; one stating that the latter was standing in the bedroom door, with his hands on the casing, and that Mrs. Mann was near by. The other testified that he came in and found them both standing in the same room, with the furniture removed, as though some work, such as papering or painting, was in progress or preparation. The proof further shows that about such time Kinney had been engaged by appellant to assist in paper hanging, and that he did some work of that character.

A young girl testified that she saw appellee and Kinney standing in the kitchen door, in the act of embracing and kissing. Another witness stated that while sitting in the yard, in Kinney's car, waiting for him, the latter came out of the front door, and as he did so, he kissed Mrs. Mann. There was further evidence to the effect that while

TERM NO. 3.

appellee, appellant, Kinney and the witness, were sitting around a small table, about two and a half feet square, playing cards, that Kinney and appellee indulged in some indecent familiarities.

Both Mrs. Mann and Kinney deny any improper relations, and deny all the acts of familiarity above referred to. Both admit that Kinney came to the house, but claim he never remained over ten minutes at any one time. Both deny any conspiracy to poison appellant, or any attempt to do so.

It is the law that adultery may be, and usually is, proven by circumstantial evidence. However, it is the established rule that where a wife is charged with such offence, before a decree is warranted, the evidence must clearly and affirmatively convince the mind that actual adultery was committed; the carnal act being all that lays the foundation for such a decree. *Hoef v. Hoef*, 323 Ill., 170. *Blake v. Blako*, 70 Ill., 618. It has been said that "in weighing the effect of such evidence, it must be so clear and strong as to carry conviction of the truth of the charge, and if it does no more than raise a suspicion of chastity, it is insufficient, and the circumstances must lead to it not only by a fair inference, but as a necessary conclusion." 9 R. C. L., 529, Sec. 106.

The evidence of acts of familiarity, as above outlined, seems to lack probative force. That these people would, in the day time, openly, almost publicly, stand in an open door and indulge in demonstrations of affection, in plain view of others, borders on the improbable; also, that they, seated at a card table, in close proximity to the husband,



TERM NO. 3.

would indulge in indecent gestures, is unlikely. Furthermore, the physical facts, as testified to by the witness, were such that it would have been all but impossible for him to have seen the acts he mentioned, even if they had taken place. Moreover, that these parties should meet in broad daylight, in the home of appellee, and there commit adultery, with the danger of detection by parties who customarily came through the unlocked door, unannounced and without warning, as shown by the evidence of the two witnesses who entered and found appellee and Kinney in the house, and with the children playing about and liable to come upon them at any time, is contrary to the usual course of conduct of parties who have the adulterous disposition and seek an opportunity for its gratification.

We think the chancellor, upon the record, was justified in finding that the proof did not "convince the judicial mind affirmatively that actual adultery was committed." *Blake v. Blake*, *supra*. Besides, the proof on the question was conflicting. The witnesses testified in open court, and the trial judge had the superior opportunity of seeing, hearing and observing their demeanor, and thereby determining their credibility. Where such is the fact, his findings will not be disturbed on review, unless manifestly against the weight of the evidence. *Lewis v. Lewis*, 316 Ill., 447. *City of Quincy v. Kemper*, 304 Ill., 303. We cannot say that the chancellor was wrong in his conclusions.

We have with care examined the evidence upon the ground

TERM NO. 3.

of attempting appellant's life by poisoning, and do not find the proof would sustain the charge.

It is our conclusion that the decree represents the equity and justice of the cause, and it will be affirmed.

Decree affirmed.

Not to be reported.



STATE OF ILLINOIS.

APPELLATE COURT.

FOURTH DISTRICT.

MAY TERM, 1932.

FILED

SEP 18 1932

Noted
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 6.

AGENDA NO. 15.

THE PEOPLE, etc.,
Defendants in Error,

VS.

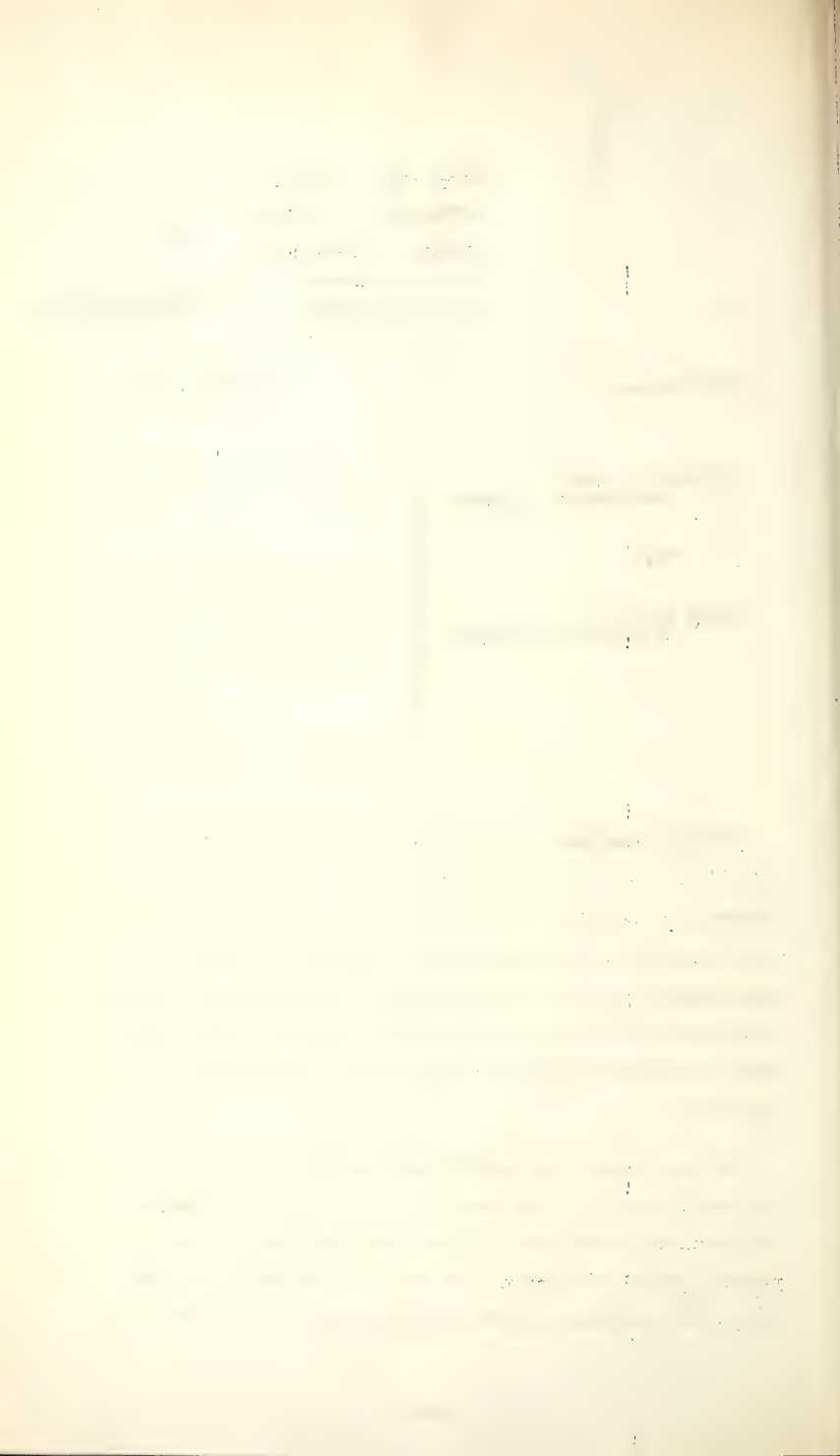
HENRY HUFF,
Plaintiff in Error.

267 I.A. 630³

ERROR TO COUNTY COURT OF
BOND COUNTY.

EDWARDS, J:- Plaintiff in error was found guilty, in the County Court of Bond County, upon three counts of an Information charging violations of the Illinois Prohibition Act. The first count alleged that he unlawfully sold intoxicating liquor; the second, that he unlawfully possessed intoxicating liquor for the purpose of sale; and the third, that he unlawfully furnished such liquor for beverage purposes.

The court, upon the jury's finding, sentenced plaintiff in error, upon the first count, to pay a fine of \$200.00, and upon the second and third counts, committed him to the Illinois State Farm for the period of three months on each count, the sentences to run consecutively. This writ of



TERM NO. 3.

error seeks to reverse such judgments, and assigns as grounds that the proof does not sustain the same, and that the court erred in the giving and refusal of instructions. There was a motion for a new trial. However, the bill of exceptions does not show that the court ruled upon same, or, if a ruling was made thereon, what it was.

It is necessary, in order to present for review the question of the sufficiency of the evidence to sustain the verdict and judgment, that plaintiff in error move for a new trial, and, if the court overrules such motion, that he except to the ruling, and then include the motion, order overruling same, exceptions to such ruling, and the evidence, in a bill of exceptions. *People v. Leonardi*, 338 Ill., 177. *People v. Gabrys*, 329 Ill., 101. The bill of exceptions fails to show that the court ruled upon the motion for a new trial, or that plaintiff in error excepted thereto; hence the question of the sufficiency of the evidence is not saved for review. The common law record, copied by the Clerk of the trial court, shows that such motion was filed and overruled. This, however, is not sufficient to save the point for the consideration of a reviewing court. *People v. Faulkner*, 248 Ill., 153. *Call v. People*, 201 Ill., 499. Upon this record the matter of the sufficiency of the evidence, is not open to our consideration.

Complaint is made of the giving of two instructions for the People, and the refusal of some for plaintiff in error. While this is alleged as ground for a new trial, in the motion filed for that purpose, the ruling upon which, as previously observed, is not shown by the bill of exceptions,



yet same could have been questioned without a motion for a new trial. *Yarber v. C. & A. Ry. Co.*, 235 Ill., 589. The matter of the correctness of the ruling in regard to such instructions is therefore properly before this court.

The fourth instruction for the People told the jury that a verdict of guilty, under the third count of the Information, might be returned if the proof showed beyond a reasonable doubt that plaintiff in error did unlawfully furnish, for use as a beverage, intoxicating liquor, to-wit: whisky, commonly called "mule," containing more than one-half of one per cent of alcohol by volume, without having a permit from the Attorney General so to do. The only criticism made is that "mule" is not one of the liquors specifically forbidden by the statute, and hence the instruction should have required the jury to find that it was intoxicating in fact, and fit for beverage purposes.

Sec. 2, Ch. 43, Cahill's Statutes, provides that the term "intoxicating liquor" shall be construed to include, among others, whisky. The instruction expressly limited the liquor to whisky, and did not deprive it of its character as such, by referring to it by some other term with which it might be synonymous. We think the instruction was intended to charge, and did charge, the sale of whisky, which is within the statutory inhibition. There was no error in giving the instruction.

Plaintiff in error, in his third refused instruction, asked the court to charge that whisky, commonly called "mule", is not one of the statutory prohibited beverages, and that to constitute it such, there must be evidence that it is in fact intoxicating. For the reasons stated in



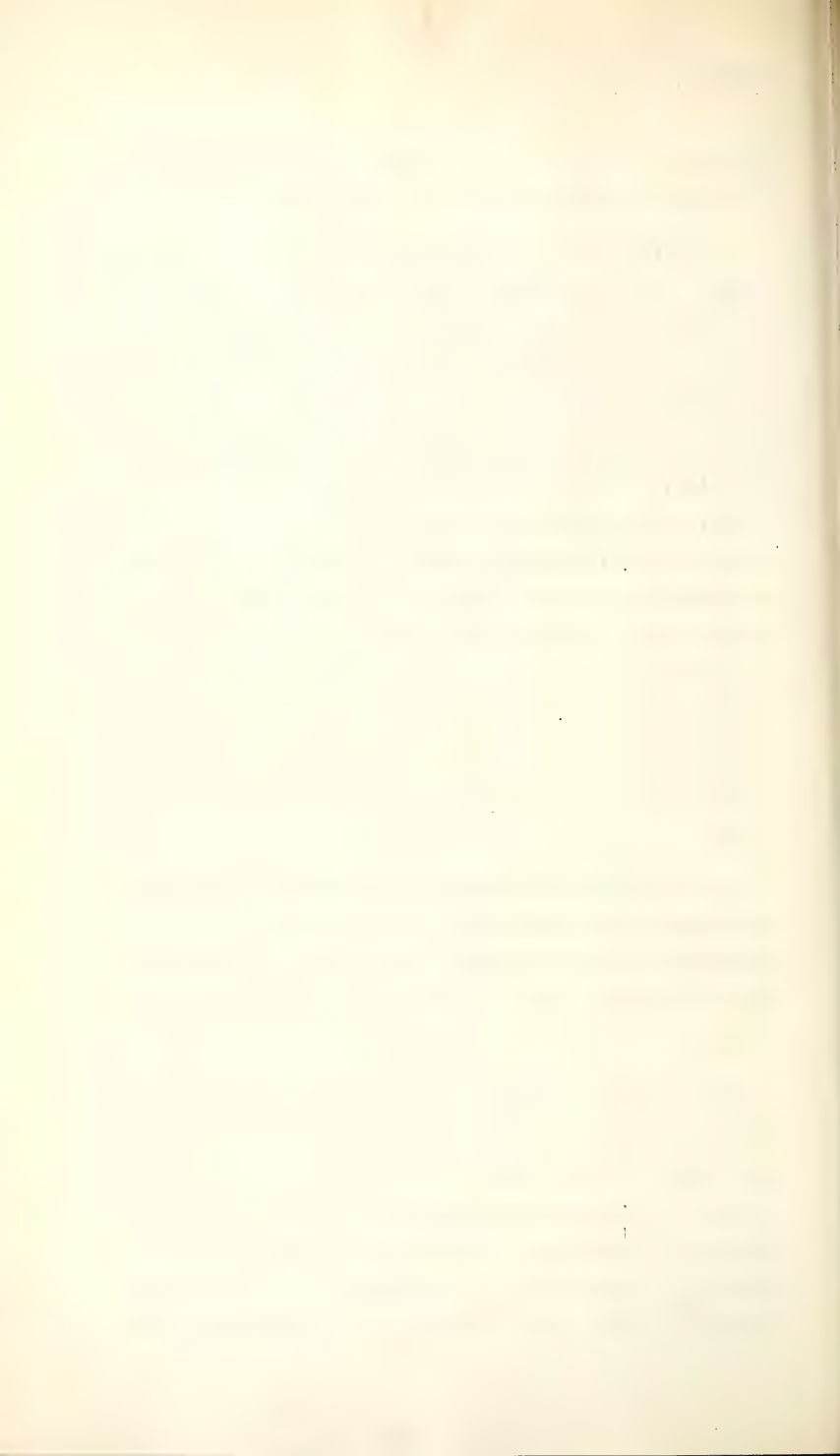
relation to the giving of People's fourth instruction, we are of opinion that this instruction was properly refused.

People's instruction number three, which related to the second count of the Information, charging unlawful possession of intoxicating liquor, informed the jury that possession of intoxicating liquor by one not legally permitted, under the Illinois Prohibition Act, to possess liquor, shall be prima facie evidence that same is kept for the purpose of violating such Act, and that the burden of proof is upon the possessor, in any action concerning same, to show that the liquor was lawfully acquired, possessed and used. Here, defendant controverted the fact of possession, and the evidence on the question was conflicting. Where such is the situation, it is error to inform the jury that the defendant, if he makes a defense, must overcome the prima facie case. People v. McCurrie, 337 Ill., 291. People v. Tate, 316 Ill., 52. The court erred in the giving of the People's third instruction.

Plaintiff in error's refused instructions, numbers one and two, were both in relation to the second count of the Information, and as the cause will be reversed and remanded as to such count, it is not necessary to consider or discuss them.

Upon the record, we are of opinion that the judgments upon the first and third counts of the Information, were justified, and they will be affirmed.

For the giving of People's erroneous third instruction, relating to the charge under the second Information count, plaintiff in error was not fairly tried as to such count, and the judgment imposed thereon will be reversed and the

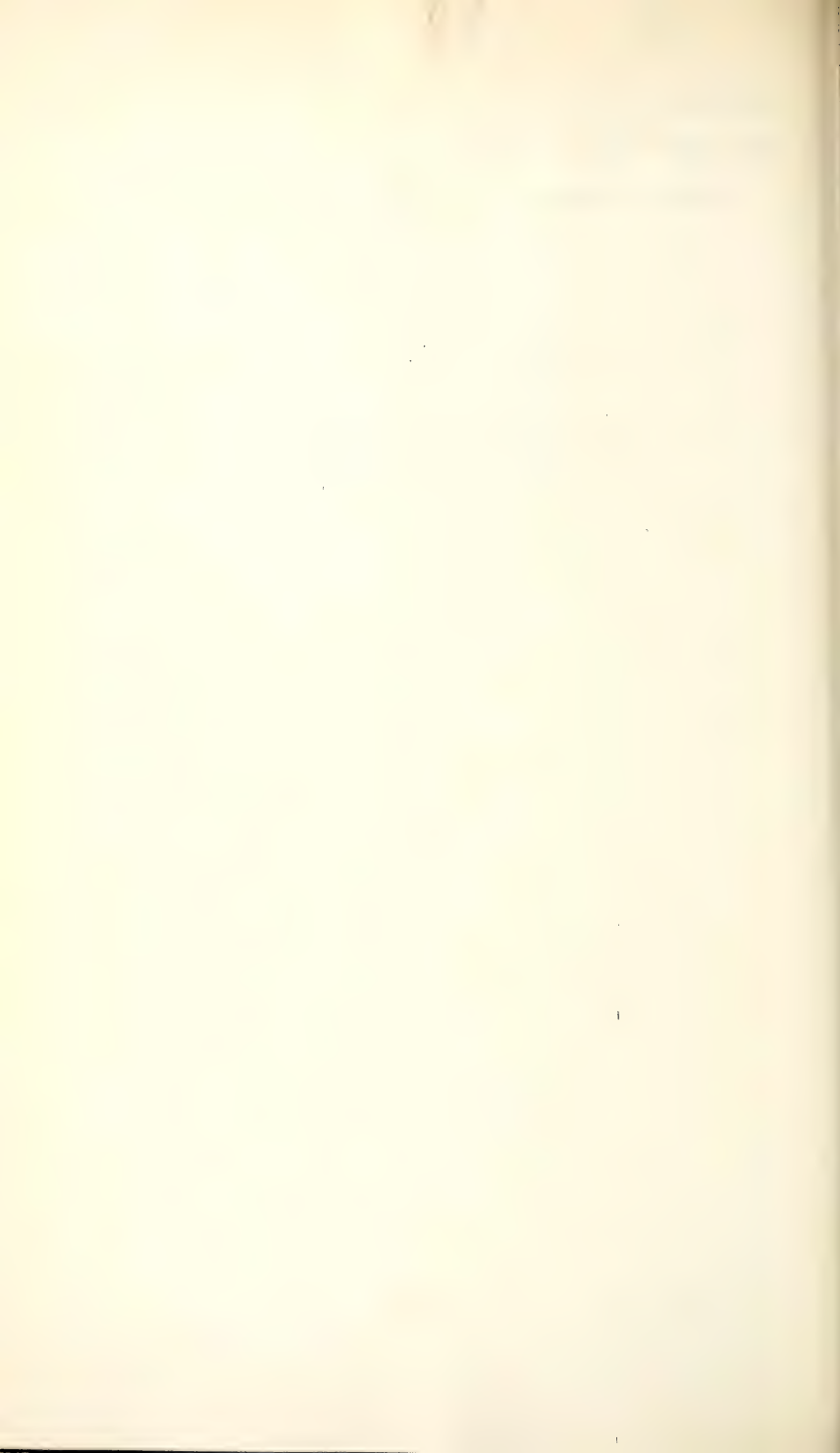


TERM NO. 6.

cause, as to same, remanded.

Affirmed in part, reversed and remanded in part.

Not to be reported in full.



STATE OF ILLINOIS.
APPELLATE COURT,
FOURTH DISTRICT.

MAY TERM, 1932.

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FILED

SEP 19 1932

RECORDED & INDEXED
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 24.

AGENDA NO. 27.

AMMA RAYBOURN,
Appellee,

VS.

MARION BUILDING & LOAN
ASSOCIATION,
Appellant.

267 I.A. 630⁴

APPEAL FROM CIRCUIT

COURT OF WILLIAMSON COUNTY.

EDWARDS, J:- Amma Raybourn, appellee, some years ago, the exact time not being shown, became a holder of stock in the Marion Building & Loan Association, having invested \$600.00 therein. It appears that, her stock having matured, same was worth \$800.00. She testified that the secretary or appellant advised her of this fact, and that she could get her money. She further testified, without objection, that when she went to procure the same, the secretary asked if she would loan it to the Association, at seven per cent interest, and she informed him she was willing, and would, if agreeable to appellant, add \$200.00 thereto; that the



suggestion being satisfactory, she drew \$200.00 from the bank, delivered it to appellant, who gave her therefor a certificate showing that she was the owner of ten shares of stock in the Association, each share of the par value of \$100.00; that she waived rights of participation in the general profits of the latter, and was to receive semi-annual interest at the rate of seven per cent. It was further provided by the certificate that same was subject to withdrawal, by either party, upon six months' notice, and that the rate of interest should not exceed the net earnings of the Association.

She further testified that later, and on December 7, 1927, she surrendered the certificate and received in exchange another like it in all respects, except the withdrawal provision, which was changed to thirty days, and that the interest should be six per cent, though a pen was drawn through this latter item. It appears by the indorsements that on said mentioned date she was paid \$10.00 to cover interest to December 1 of that year. Every six months thereafter, similar payments, in the sum of \$30.00 each, were made, until December 10, 1930, when she received \$20.00 as interest to the first of such month. She gave to appellant a thirty days notice of withdrawal, which she stated its agent said would be sufficient, and upon refusal to pay, instituted this suit.

The declaration consisted of the common and two special counts; the first of which averred her holding of the certificate, that she gave notice of withdrawal according to its terms, and appellant's refusal to pay. The second charged the transaction was a loan, and that she was, to appellant, a creditor.

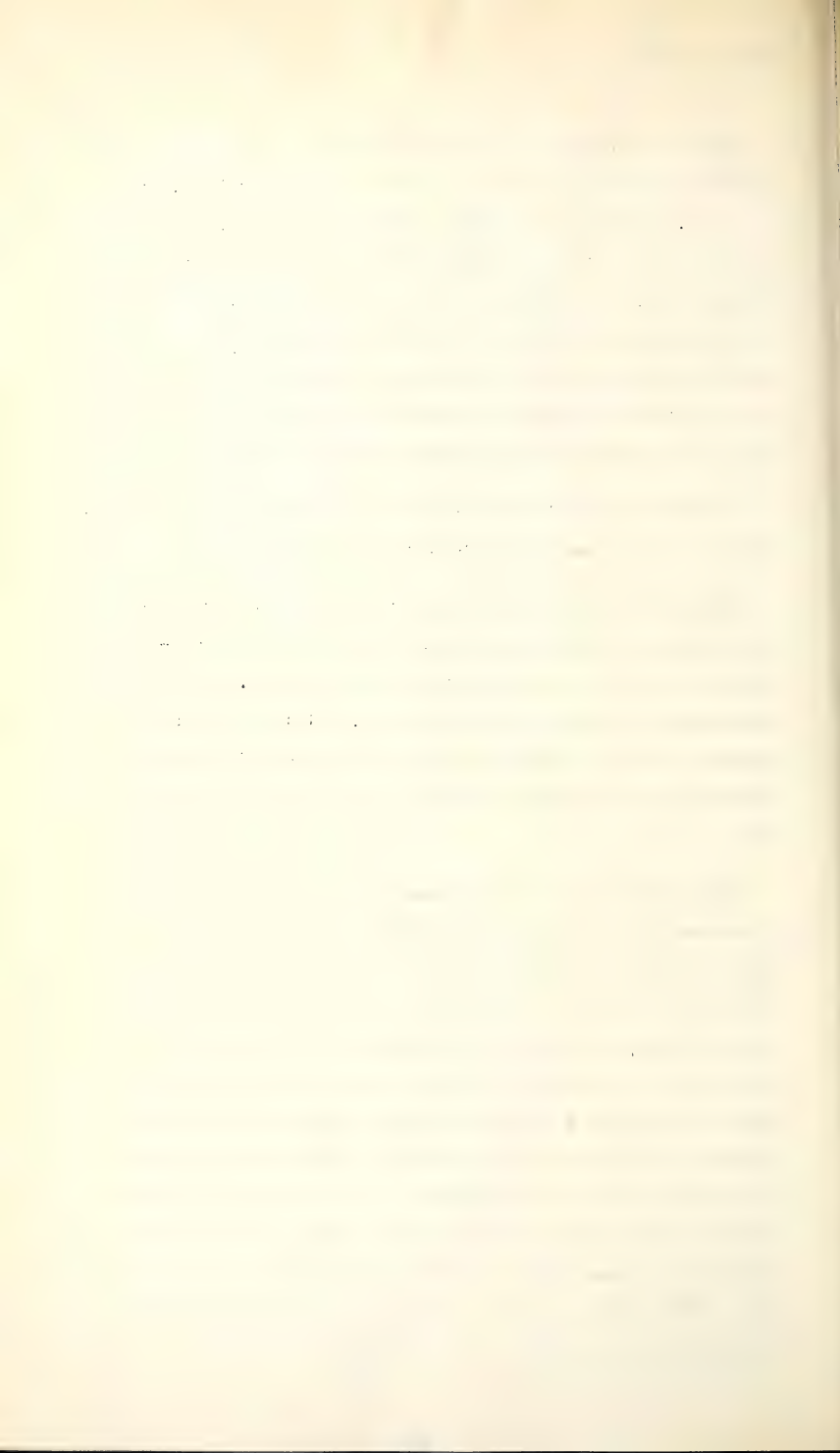


There was pleaded the general issue. The cause was submitted to the court upon the testimony of appellee, as outlined, and said certificate. No evidence was offered by appellant, nor were any propositions of law submitted by either party. The court gave judgment in favor of appellee, for \$1,070.00,- the face of the certificate and the accrued interest, making a specific finding that the relation of debtor and creditor existed, and that the transaction was a loan. Appellant has appealed from the judgment.

The first ground urged for reversal is that the court erred in holding appellee was a creditor of appellant.

The certificate is unambiguous and readily understandable. Appellee's testimony shows that she knew its contents, and that no fraud was practiced upon her. She accepted the document without protest, retained it from December, 1927, to December, 1930, making no objection, and received the semi-annual interest payments as they fell due.

The instrument, upon its face, informed her that she was a share-holder in appellant, and that her name appeared upon the corporate books as such, and not as its creditor. It further advised her that she would receive interest, only as warranted by the net earnings of the Association, which might be variable or indefinite, while in the case of the ordinary loan the interest rate is fixed and certain. Appellee, we think, having accepted the certificate knowingly and freely, with an understanding of its terms, and retaining it without objection for three years, during which time she received its substantial benefits, adopted the instrument as the written evidence of her contract, and that its provisions constitute the agreement of the parties.



TERM NO. 24.

The certificate, with the exception of the thirty day withdrawal clause, was one which appellant was authorized to issue by the provisions of Section 222 and 224, Chapter 32, Smith-Murd Revised Statutes, 1931, and would, when issued and accepted, constitute a valid contract between the parties. We think her relation to appellant was that of stockholder, and not creditor.

A further contention of appellant is that if such be the fact, then appellee has no ground for recovery, for the reason that she failed to prove the statutory pre-requisites to a stockholder's right to withdrawal, as set forth in Section 225, Chapter 32, Smith-Murd R. S., 1931, which provides, among other things, that stockholders' withdrawals shall be paid in the order in which demands therefor are filed, and shall only be paid if there be money in the Association treasury applicable to their satisfaction. No objection of this nature was made in the trial court, and under the rule of *Prairie State Loan Ass'n. v. Gorrie*, 167 Ill., 418, cannot be first raised upon a review of the case. Moreover, it was held in *St. Louis Loan & Investment Co. v. Yantis*, 173 Ill., 321, that such matters are those of defense, and the plaintiff is not required, in the first instance, to make affirmative proof in regard to the same. The point is not properly before this court.

Appellant also urges that the clause of the certificate, giving right to withdrawal upon thirty days' notice, was ultra vires the Association. This question was likewise not raised in the trial court, and under the authority of the *Gorrie* case, supra, is not open to our consideration. Furthermore, a corporation can only invoke ultra vires as a defense when it has specifically pleaded same. *Lake St. El.*

1875

The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1875. The names are arranged in alphabetical order of their surnames. The names of the persons who have been elected to the office of Justice of the Peace for the year 1875 are as follows: [The following text is extremely faint and largely illegible due to the quality of the scan. It appears to be a list of names, possibly of elected officials, arranged in columns. The text is too blurry to transcribe accurately.]

TERM NO. 24.

R. R. Co. v. Carmichael, 184 Ill., at page 351. McLean Co. v. Sidebottom, 178 N. E. R., 284, (Mass.).

The record contains no evidence that appellant was insolvent at the time notice of withdrawal was given, nor when the suit was brought; hence, under the authority of St. Louis Loan & Investment Co. v. Yantis, supra, appellee was entitled to bring and maintain her action upon refusal of appellant to pay the withdrawal of stock, and the proper remedy is assumpsit. Prairie State Loan Ass'n. v. Gorrie, supra.

Upon this record we are of opinion that appellee was entitled to a recovery, as a withdrawing stockholder, for the face of the stock certificate and the accrued interest, and the judgment is affirmed.

AFFIRMED.

Not to be reported in full.



STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

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FILED

SEP 10 1932

MAY TERM A. D. 1932.

W. H. H. ROY
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 9.

AGENDA NO. 5.

EMMETT E. MIDDLETON,
Appellant.

VS.

NORTH AMERICAN PROTECTIVE
ASSOCIATION,
Appellee.

267 I.A. 630⁵

APPEAL FROM CIRCUIT COURT
OF
MARION COUNTY.

FULTON, J:-- This is a suit in assumpsit against the Appellee to recover on a policy of insurance issued to the insured by the North America Mutual Union payable to Appellant.

The case was tried before the Court, a jury having been waived by agreement of the parties, and upon a consideration of the testimony, the issues were determined against the Appellant, and judgment entered for the Appellee.

Appellant by this Appeal seeks to reverse the judgment of the Circuit Court of Marion County.

The declaration alleges that the North America Mutual

TERM NO. 9.

Union issued a policy of insurance upon the life of Mary Angeline Daniels, a sister of Appellant, agreeing to pay Five Hundred (\$500.00) dollars in case of the death of the insured; that all contributions and assessments on said policy had been paid by Appellant; that the North America Mutual Union, on or about August 15th, 1927, continued its corporate existence and re-incorporated under the name of Appellee and took over all of the assets of, and were now doing business with the assets of the said North America Mutual Union.

That Appellee notified the Appellant of the cancellation of the policy in question, on account of the change in the law of insurance after January 1st, 1928, and that thereby Appellee waived all provisions of the policy. That Appellee sent a notice to Appellant on or about February 7th, 1928, requesting that the insured re-instate her policy in Appellee Company, but that insured was then unable to re-instate in said Company; that on account of said cancellation and waiver of all notices by Appellee, the Appellant did not send notice of the death of said insured but brought suit on the policy. To this declaration the plea of general issue was filed together with a special plea, duly verified, denying the execution by Appellee and delivery of the policy of insurance sued on.

The essential averments of the declaration in controversy and which it was necessary for Appellant to prove were:

First: The re-incorporation by North America Mutual Union under the name of Appellee, North American Protective Association;

Second: The taking over of all the assets of the North America Mutual Union by Appellee;

Third: The cancellation by Appellee of the policy sued upon which was issued by the North America Mutual Union;

Fourth: The request on the part of Appellee to re-instate the insured in North American Protective Association.

There is no testimony in the record that will support these averments. The Charter of Appellee shows that it is a re-incorporation of an old Mutual Company incorporated under the name of United States Benefit Company, whereas the proceedings filed in the Circuit Court of Sangamon County to dissolve the North America Mutual Union show the appointment of a Receiver, the administering of the assets of the corporation by the Receiver and the decree of dissolution. This proceeding shows conclusively that the distribution of the assets were placed under the administration of that Court.

It is true that some of the officers of Appellee had been interested in the North America Mutual Union and other companies and that agents of the Appellee had instructions from its President to solicit new policy holders from the ranks of the old North America Mutual Union, after it had gone into the hands of a Receiver, but none of this testimony could be construed as evidence of a re-incorporation as charged in the declaration, or as a transfer of the assets from the North America Mutual Union to Appellee.

Reading the Exhibit introduced in evidence to show cancellation of the policy by Appellee clearly shows the notice to have been written by the North America Mutual Union and that

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The author then proceeds to a detailed examination of the various theories which have been proposed to explain the origin of life. He discusses the theory of spontaneous generation, the theory of biogenesis, and the theory of abiogenesis. He also discusses the theory of the origin of life from non-living matter, and the theory of the origin of life from living matter. The author concludes that the theory of abiogenesis is the most plausible of the theories which have been proposed.

The second part of the paper is devoted to a detailed examination of the various theories which have been proposed to explain the origin of life. He discusses the theory of spontaneous generation, the theory of biogenesis, and the theory of abiogenesis. He also discusses the theory of the origin of life from non-living matter, and the theory of the origin of life from living matter. The author concludes that the theory of abiogenesis is the most plausible of the theories which have been proposed.

The third part of the paper is devoted to a detailed examination of the various theories which have been proposed to explain the origin of life. He discusses the theory of spontaneous generation, the theory of biogenesis, and the theory of abiogenesis. He also discusses the theory of the origin of life from non-living matter, and the theory of the origin of life from living matter. The author concludes that the theory of abiogenesis is the most plausible of the theories which have been proposed.

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The fifth part of the paper is devoted to a detailed examination of the various theories which have been proposed to explain the origin of life. He discusses the theory of spontaneous generation, the theory of biogenesis, and the theory of abiogenesis. He also discusses the theory of the origin of life from non-living matter, and the theory of the origin of life from living matter. The author concludes that the theory of abiogenesis is the most plausible of the theories which have been proposed.

TERM NO. 9.

Appellee was not in any way connected with it.

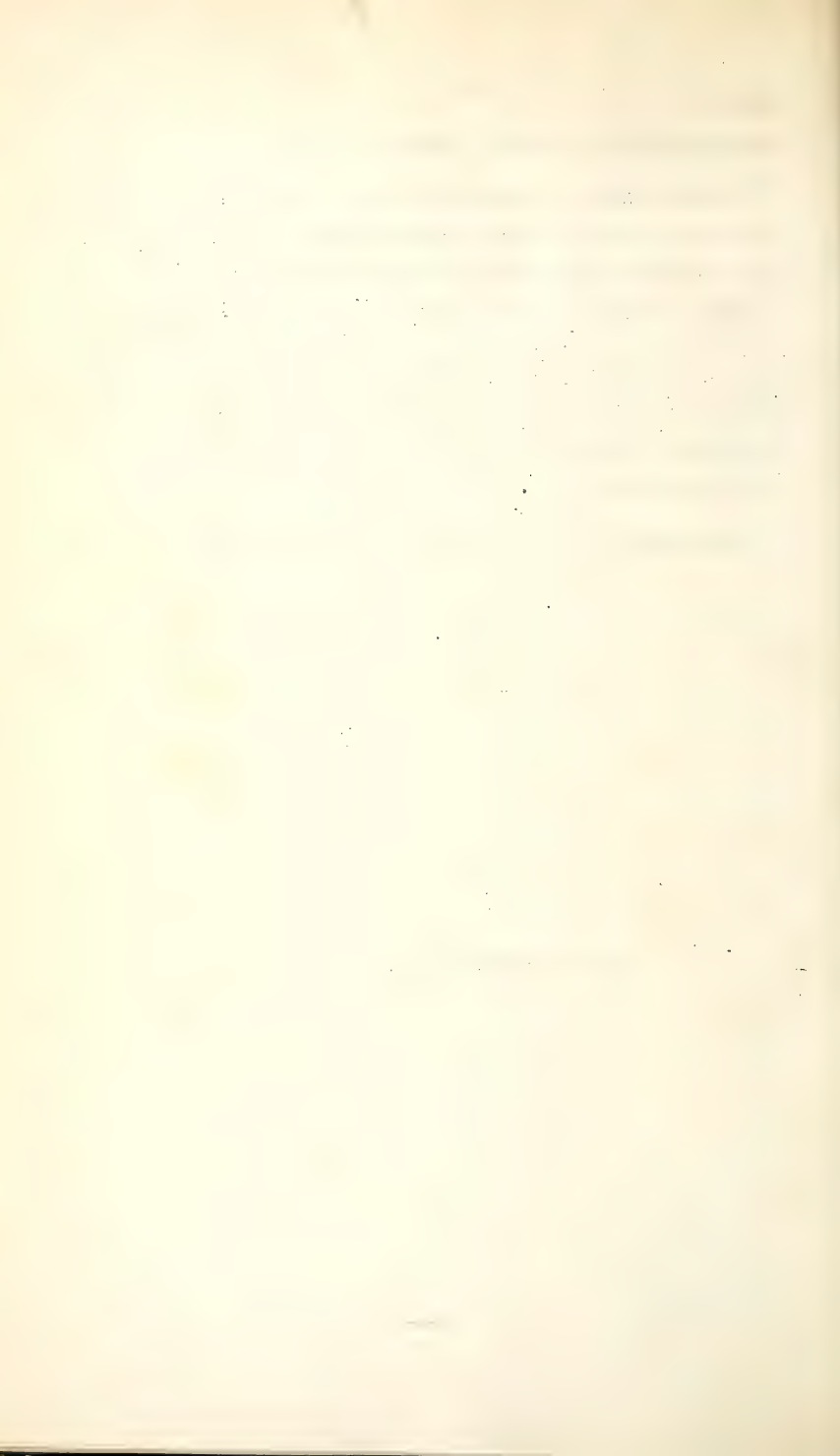
The other Exhibit relied upon to show a request by Appellee to re-instate the insured in North American Protective Association was merely a letter extending the insured special privilege of taking out a policy in the Company.

At no place can we find evidence sufficient to sustain the material averments of the declaration and there was no error committed by the Court in passing upon the written propositions of law submitted.

The judgment of the lower Court will be affirmed.

AFFIRMED.

Not to be reported in full.



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STATE OF ILLINOIS.

APPELLATE COURT.

FOURTH DISTRICT.

FILED

SEP 19 1932

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

MAY TERM, A. D. 1932.

TERM NO. 17.

AGENDA NO. 20.

JOHN JAVORCHIK,
Appellee

VS.

McKESSON-SCHUH DRUG
COMPANY, a corporation
Appellant.

267 I.A. 631

APPEAL FROM CITY COURT
OF MARION.

FULTON, J:- This is an action of trespass on the case for personal injuries arising out of an automobile collision.

On a trial before a jury a verdict was returned in favor of Appellee in the sum of Two Thousand (\$2000.00) dollars. After motion for new trial was overruled, judgment was entered against Appellant on the verdict and this Appeal is prosecuted to reverse said judgment.

At the time of the accident Appellee was riding as a guest in an Oldsmobile Coupe which collided with Appellants Reo Truck. The declaration contained two counts. Both counts allege that the collision occurred at a point in Johnston City, Illinois, where State Route 37 crosses and

TERM NO. 17.

intersects Broadway Street, a paved street in Johnston City, and that the date of the collision was December 26th, 1920, at seven o'clock P. M.

The first count recites the exercise of due care on the part of Appellee and then charges the Appellant, by its servants with driving its truck in a southerly direction on Route 37 across Broadway Street "so carelessly, negligently, recklessly, wilfully and wantonly at an excessive rate of speed, having regard for the traffic and use of the way then and there existing at the speed of, to-wit: forty miles per hour" and that as a result of such negligence, recklessness, wilfulness and wantonness the Appellants truck ran into the Coupe in which Appellee was riding, etc.

The second count charges negligence in driving at a rate of speed that was greater than was reasonable and proper, in view of the traffic and use of the way.

At the close of Appellee's evidence and again at the close of all of the testimony, Appellant moved for a directed verdict generally and as to each count.

The Appellant first urges the defense of contributory negligence on the part of Appellee, but, if he is entitled to recover under the first count which charges wilful and wanton conduct, contributory negligence is not a defense. It is therefore necessary to determine first whether the proof supports the charge of wilful and wanton conduct alleged in the first count of the declaration.

The testimony of the witnesses Page and Lowman, who were driving North on Route 37, and met the truck just North of

the intersection fix the speed of the truck at from thirty to forty miles per hour. The Appellee and the witness Morris with whom Appellee was riding testify they did not see the truck until it was about eight feet distant from them and fix the speed at from thirty-five to forty-five miles per hour. Bruner, the driver of the truck for Appellant stated that he was driving about twenty-five miles per hour and slowed down a trifle for the intersection; that there was a governor on the truck which limited the speed to not over thirty-five miles per hour.

The witness Morris further testified that he had stopped his car at the stop sign on Broadway some thirty to sixty feet East of the Easterly edge of Route 37, and from that point had proceeded slowly up to and into the intersection in second gear and at the rate of about five to ten miles per hour. Appellants car was being driven on a State highway and under the Statute was given right of way over cars crossing said highway. Under this state of the proof it could hardly be said that Appellant was guilty of any wilful and wanton conduct.

The . more fact, in and of itself, that a train or car is driven at a speed prohibited by law will not furnish a sufficient reason for holding that an injury was wilful or wanton. *Ruwisch vs. Knoebel*, 233 App. 526, citing *Blanchard vs. I. S. & M. S. Railway Company* 126 Ill. 416, *Illinois Central Railway Company, vs. Eicher* 202 Ill. 556. Many later decisions have followed and affirmed this principal of law.

While the question of wilful and wanton conduct is usually



one for the jury to determine, there was no testimony submitted to the jury in this case from which they could reasonably find the conduct of Appellant to be wilful and wanton.

The Court should have granted the motion to find the Appellant not guilty under the first count of the declaration.

If the evidence did not support a charge of wilful and wanton conduct then contributory negligence could be interposed as a defense. The testimony of Appellee clearly shows that he was riding as an invited guest on the right side of the drivers seat in the Morris automobile, knowing that the driver was approaching Route 37 which, he was entirely familiar with, that the car in which he was riding stopped at the stop sign some thirty to sixty feet East of the East edge of Route 37 and then proceeded up to and across the intersection in second gear and at a slow rate of speed that he watched a car approaching from the South on Route 37 across the intersection just ahead of them but that he looked South all the time and never saw Appellants truck until it was almost on top of the Morris car some eight feet away; that he gave no warning of any kind to Morris prior to that time and never looked toward the North or paid any attention to traffic from that direction until just before the collision; that there was no obstruction to the view North for quite a distance on Route 37, from the Morris automobile after it stopped at a stop sign on Broadway.

In Opp vs. Pryor, 294 Ill. 538, the Court said,

"It was essential for the plaintiff to prove that



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she was in the exercise of ordinary care for her own safety in approaching and going upon the crossing and she was not relieved from that duty because she was riding in an automobile. If she exercised such care any negligence of Ethel Shambaugh could not be imputed to her, but she would be responsible for her own negligence. The plaintiff sat at the right of the driver in front, with at least equal opportunity to observe danger and the approach of the train and being bound to prove the exercise of ordinary care by herself, it was no less her duty than that of the driver to observe and avoid danger, if practicable, and to warn the driver."

In *Dee vs. City of Peru*, 343 Ill. 36, it was stated, "It is the duty of a passenger in a vehicle, where he has an opportunity to learn of the danger and to avoid it, to warn the driver of such vehicle of approaching danger, and he has no right, because some one else is driving, to omit reasonable and prudent efforts on his own part to avoid danger."

We think the evidence of the Appellee conclusively shows that he did not exercise due care and caution for his own safety and that the verdict of the jury is manifestly against the weight of the evidence on the question of contributory negligence.

For the reasons stated the judgment of the City Court of the City of Marion is reversed and the cause remanded.

Reversed and Remanded.

Not to be reported in full.

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FILED

STATE OF ILLINOIS.

APPELLATE COURT.

FOURTH DISTRICT.

SEP 10 1932

Robert S. Noel
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

MAY TERM, A. D. 1932.

TERM NO. 23.

AGENDA NO. 14.

IN THE MATTER OF THE
ESTATE OF HENRY (HEINRICH)
ALBRECHT, Deceased,

HERBERT C. CROCKER,
Administrator de Bonis non
with the Will Annexed, of
the Estate of HENRY ALBRECHT,
Deceased,
Appellant,

VS.

HERMAN ALBRECHT and
FRITZ ALBRECHT,
Appellees.

267 I.A. 631²

APPEAL FROM PROBATE
COURT OF MADISON
COUNTY.

FULTON, J:- This is an appeal from an order of the Probate Court of Madison County, Illinois, in the Estate of Henry Albrecht, deceased, dismissing a petition to sell real estate to pay the amount claimed to be due Christian Albrecht on a legacy. The record shows that Henry Albrecht died February 27th, 1885, leaving three sons and four daughters by his first marriage and three sons and one daughter by his second marriage. His wife Eleanore Albrecht also survived him.

On March 11th, 1885, the Will of the decedent was admitted

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to Probate, and Eleanore Albrecht was appointed administrator with the Will Annexed, and duly qualified, A reading of the Will shows that the testator gave all of his property to his widow to divide among his children as therein set forth and the material parts of said Will read as follows:-

"I, Heinrich Albrecht, bequeath hereby to my lawful wife, Eleanore Albrecht, in case of my death, my entire movable and immovable property under the following named provisions;

"First,- In reference to the children of my first marriage (he then lists therein legacies to the children of his first marriage).

"Second,- In reference to the children of my second marriage I direct that my lawful wife, Eleanore Albrecht, shall be authorized and required to divide as she desires my total real and total personal property between my two youngest sons, Herman and Fritz Albrecht when the ^{latter} is 25 years old on April 4, 1898; my son Christian Albrecht, shall when he is 40 years old on the 20th of April, 1904, receive \$500.00 then other provisions as to children of the second marriage).

"Third,- Should my wife, Eleanore Albrecht, marry again after my death, then my personal property shall be sold at auction to pay my remaining debts.

"Fourth,- In case my surviving lawful wife, Eleanore Albrecht, should die without direction with reference to the division of my real estate between my two youngest sons, then the Probate Court shall appoint an Administrator to take charge of the real estate for my two youngest sons and when the youngest, Fritz Albrecht, is 25 years old on the 4th of April, 1898, it should be left to the two youngest sons,

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Herman and Fritz as they agree between themselves concerning the real estate I left behind as well as to the remaining personal property."

The petition of the Appellant avers that the legacy of \$500.00 bequeathed to Christian Albrecht by the second clause of the Will has not been fully paid; that there are no personal assets in the said estate with which to pay said legacy; that the amount due and unpaid thereon is a lien on the real estate devised under said Will to Appellees and prays for an order to sell sufficient of said real estate to pay the unpaid portion of said legacy.

We can find nothing in the text of the Will making the payment of the legacies a charge upon the real estate, and nothing appears from a reading of the instrument which indicates an intention on the part of the testator to make the pecuniary legacies a charge on the real estate.

In the case of Shuld vs. Wilson, 225 Ill. 336, the Court said, "The rule is, that pecuniary legacies are payable out of the personal estate of the testator, and unless made a charge against the real estate, where there is not sufficient personal estate to pay them, such legacies must abate. If, however, it appears from the Will that it was the intention of the testator to make the pecuniary legacies a charge on the real estate then the real estate must be restored to, to make up any deficiency in the payment of the legacies from the personal estate."

While we believe the order of the Court could be sustained on the proofs introduced at the trial, we are convinced that the terms of the Will do not permit the Administrator to



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resort to the real estate for the payment of pecuniary legacies and therefore the order of the County Court dismissing Appellants Petition will be affirmed.

AFFIRMED.

Not to be reported in full.

Ill.Unpublished opinions

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